Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

ALMA FAYE RUSSELL, Petitioner

v.

CITY OF DALLAS AND THE BOARD OF TRUSTEES OF THE FIREMEN, POLICEMEN AND FIRE ALARM OPERATORS' PENSION FUND OF DALLAS, TEXAS, Respondents

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BARBARA R. HUNT
208 S. Akard
Room 2900
Dallas, Texas 75201
214/464-7551

Of Counsel

CAROL L. TACKER
208 S. Akard
Room 2900
Dallas, Texas 75201
214/464-2219

Counsel of Record

38 pp

QUESTIONS PRESENTED

(1) Whether the Circuit Court properly held that continued enforcement of a facially discriminatory pension provision was not a continuing tort and, thus, did not suspend the running of the statute of limitations.

(2) Whether Texas law or federal law controls the issue of whether a continuing tort suspends the running of the Statute of Limitations.

(3) Whether the Circuit Court properly applied federal law as to when Petitioner's Causes of Action accrued in this case.

(4) Whether the Circuit Court could properly base its decision affirming Summary Judgment below upon a judicial resolution of a disputed fact issue in favor of the movant and an invalid analysis of retroactivity.

(5) Whether the Circuit Court properly disposed of Petitioner's Cause of Action for breach of fiduciary duty through its resolution of a disputed fact issue in favor of movant.

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties in interest.

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2. The decision below erroneously determined the date of accrual of Petitioner's causes of action and such erroneous decision endangers national policies protecting individual rights and disfavoring restraints upon the fundamental right to marry by allowing the statute of limitations to block a challenge to a facially discriminatory provision that openly and obviously discriminates upon the basis of marital status . . 18

3. This Petition should be granted because this decision expands the standard for summary judgment in federal courts far beyond the standard set by this Court in the summary judgment trilogy of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex v. Catrett*, 477 U.S. 317 (1986)("Summary Judgment Trilogy") . 20

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E: Order of the United States District Court for the Northern District of Texas Granting Defendant's Motion for Summary Judgment (July 17, 1991)

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PETITION FOR WRIT OF CERTIORARI

Alma Faye Russell respectfully petitions that a writ of certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW AND GROUNDS OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit, entered August 14, 1992 and reported at 968 F.2d 489, is reprinted at pp. 1-13 of the Separate Appendix as Section A. The Order of that court denying Petitioner's Motion for Rehearing (timely filed on August 28, 1992) was entered on September 10, 1992 and is reprinted at pp. 14-15 of the Separate Appendix as Section B. The Judgment and the Final Judgment of the United States District Court for the Northern District of Texas, Dallas Division, were entered on July 17, 1991 and are reprinted at pp. 16-17 and 18-19 as Sections C and D, respectively of the Separate Appendix. The Order Granting Defendants' Motion for Summary Judgment entered on July 17, 1991 is reprinted as Section E of the Separate Appendix at pages 20-25. The Order Granting City of Dallas' Motion for Summary Judgment was also entered on July 17, 1991 and is reprinted at pp. 26-29 as Section F of the Separate Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.S. § 1254(1).

CONSTITUTIONAL, STATUTORY AND PENSION PLAN PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1 is printed verbatim as Section G of the Separate Appendix on page 30.

Section 1983, 42 U.S.C. § 1983 (1982) is printed verbatim as Section H of the Separate Appendix on p. 31.

Section 6.07 of Plan B as it existed on the date of death of Petitioner's husband is printed verbatim at pp. 32-36 of the Separate Appendix as Section I.

The 1988 Amendment to Section 6.07 of Plan B is printed verbatim at pp. 37-39 of the Separate Appendix as Section J.

Section 6.07 of Plan B as it existed after the April 21, 1988, amendments became effective is printed verbatim at pp. 40-46 of the Separate Appendix as Section K.

STATEMENT OF THE CASE

Petitioner, Alma Faye Russell, is a 68 year old widow who was married for more than forty years to Robert George Russell ("Mr. Russell" hereinafter), an assistant chief in the Dallas Fire Department. Mr. Russell had retired on July 2, 1976 as a member of the Firemen, Policemen and Fire Alarm Operators Pension ("Fund") under Plan B, one of the payment plans available as an option to Members of the Fund. After Mr. Russell's death in 1981, Mrs. Russell was paid benefits by the Board of Trustees for the Fund ("Board") "as a qualified surviving spouse" pursuant to the terms of Plan B (See Undisputed

spouse" pursuant to the terms of Plan B (See Undisputed Facts, Plaintiffs Motion for Summary Judgment and Brief, (R. Vol. III, p. 003, Entry 47).

When Mrs. Russell remarried in 1986, the Board began withholding her benefits pursuant to the provision of Plan B that imposed a marital status condition on the right to continue to receive benefit payments under the Plan, i.e., the payments stopped upon remarriage. Mrs. Russell did not contest the Board's action in withholding her benefits at that time. Mrs. Russell was subsequently divorced and wrote a letter to the Board requesting continuance of her benefits; that request was informally denied.

The Plan was amended, effective April 21, 1988, and the marital status condition on the right to continue to receive benefits under the Plan was removed. Mrs. Russell requested an evidentiary hearing pursuant to Section 6.07(d)(3) of Plan B to present to the Board evidence as to the reasons that her benefits should be continued. (R. Vol. III, p. 141, Entry 47) Section 6.07 (d)(3) reads as follows: "Any surviving spouse whose benefits are being withheld may demand a hearing before the Board and present testimony to show why his benefits should be continued. Following such a hearing, the decision of the Board regarding benefits shall be final."

That request was granted by letter dated February 15, 1989. (R. Vol. III, p. 142, Entry 47).

Counsel for Mrs. Russell made several arguments at the hearing, including the argument that Mrs. Russell was currently entitled to payment of benefits for the remainder of her life under the clear terms of Plan B, as amended. After some discussion among the Board members and legal counsel for the Board, the Board decided to defer its decision on Mrs. Russell's claim to allow the Fund's

attorney time to research the issue. The Board subsequently notified Mrs. Russell by letter that a decision would be deferred because the Fund's attorney had resigned and the Board was in the process of retaining new legal counsel. (R. Vol. III, p. 143, Entry 47)

On May 11, 1989, the Board finally denied Appellant's request for benefits, such denial allegedly based upon "the plan language which requires that in order to be eligible for the lifetime survivor benefit, you must have been receiving a survivor benefit on April 21, 1988, which was the effective date of the amendment." (R. Vol. III, p. 144, Entry 47). There is no such language in the Pension Plan, either prior to, or after, the 1988 amendments. As noted above, pursuant to the terms of Plan B, the Board's action in withholding Mrs. Russell's survivor benefits became final only following the evidentiary hearing when the Board made its decision regarding benefits.

Petitioner filed suit in the United States District Court for the Northern District of Texas on May 10, 1990, seeking a declaratory judgment and both injunctive relief and damages for denial of her benefits under Plan B of the Fund in violation of state and federal public policy; 42 U.S.C.A. § 1983; the Fourteenth Amendment to the United States Constitution; Article XVI, Section 67(c) of the Texas Constitution, and the clear terms of Plan B itself, as amended.[1] Discovery commenced, but before the close of discovery, Defendants each filed Motions for Summary Judgment and Petitioner filed a Motion for Partial Summary Judgment only as to her contract claim based upon the 1988 amendment. On July 19, 1991, the United States District Court for the Northern District of Texas, Dallas Division,

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[1]The District Court has jurisdiction pursuant to 28 U.S.C. §1331.

entered an Order Granting Defendant's Motion for Summary Judgment on the basis that Petitioner's federal claims were barred by the statute of limitations and the Petitioner lacked standing to make claims based on events and amendments to the Plan after that date of her remarriage on April 26, 1986. On that same date the Court issued an Order Granting City of Dallas' Motion for Summary Judgment on the basis that the City of Dallas and the Board of Trustees are distinct entities and that the Board of Trustees has the sole responsibility for administering the fund. The District Court did not address Petitioner's claim that the denial of benefits based on marital status was a "continuing violation." The Court also entered its Final Judgment and Judgment on July 17, 1991 dismissing the case with prejudice as to the Board of Trustees and the City of Dallas, respectively.

Petitioner filed her notice of appeal on August 7, 1991 and the circuit court affirmed both Summary Judgments, although in part on different grounds. The Circuit Court purported to apply the *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir.) *cert. denied*, 479 U.S. 868 (1986) standard and concluded that the continuing violation theory did not apply and that the statute of limitations had run as to all of Petitioners pre-1988 claims. The Court then considered some, but not all, of the record evidence as to the facts surrounding 1988 Amendments and resolved a disputed fact question in favor of movant to sustain the Summary Judgments against Petitioner. The Court went beyond the terms of the Plan to examine some, but not all, of the extrinsic evidence as to the intent of the members (firemen and policemen) when they approved the amendment and concluded that the amendment did not apply to Petitioner. However, such resolution of disputed facts only strengthened Petition's breach of fiduciary duty claim, which could only have accrued when the Board reached its

final decision that the amendment did not apply to Petitioner on May 11, 1989, within one year of the date Petitioner filed suit.

REASONS FOR GRANTING THE WRIT

1. The circuit court's determination that Petitioner's challenge to the continued enforcement of a facially discriminatory pension plan provision is barred by the statute of limitations is in direct conflict with the direction given by this Court in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) and is also in conflict with standards set by the Ninth Circuit and the Sixth Circuit for continuing violations.

The circuit court's decision is also a misapplication of the Fifth Circuit standard for continuing violations established in *Berry v. Board of Supervisors*, 715 F. 2d 971 (5th Cir. 1983) *cert. denied*, 479 U.S. 868 (1986). This case has far greater impact than just the impact on Petitioner and other similarly situated widows because it undermines the development of a unified standard for determination of a continuing violation.

As one commentator has very recently stated:

> "Notwithstanding the efforts of this Comment to clarify it, the law of continuing violations remains in a state of confusion, particularly among the different circuits.
>
> ...
>
> The Court's decision in Lorance clarified its position on facially neutral seniority systems, and this reasoning should extend to all facially neutral employment policies. However, the Court should

> not hesitate in granting certiorari to reinforce its statement in Lorance that a facially discriminatory seniority system could be challenged at any time. Correspondingly, this reasoning should extend to all discriminatory employment policies that continually injure employees." [footnotes omitted] Reid, *Comments: Confusion in the Sixth Circuit: The Application of the Continuing Doctrine to Employment Discrimination*. 60 U. Cin. L. Rev. 1335, 1362 (1992).

Certiorari should be granted in this case for the purpose of reaffirming this Court's statement in the *Lorance* case that: "There is no doubt, of course, that a facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged at any time ..." 490 U.S. 900, 912 (1989). Such ruling would go a long way toward providing the much needed clarity on the question of continuing violations called for by the Commentator above.

The provision at issue here, Section 6.07 of Plan B of the Dallas Firemen, Policemen and Fire Alarm Operators Pension Fund (See Section I of the Separate Appendix at pages 32-36) clearly conditions the continuation of benefits for surviving spouses on marital status. Section 6.07 of Plan B was amended, effective April 21, 1988, to remove the discriminatory "remarriage" condition to continuation of benefits. (See Section J of the Separate Appendix at pages 37-39). The Plan, as amended, is now facially neutral. However, the circuit court held that the Board correctly decided that the amendment only applied to those widows who were receiving benefits on the effective date of the amendment.

The action of the board in drafting the 1988 ballot language and subsequently determining that the amendment would not apply to those widows who had already been the victims of the facially discriminatory marital status condition withholding of benefits constituted a new act of discrimination and a breach of Board's fiduciary duty to treat similarly situated widows in the same manner. Instead, in drafting the ballot language, and in their subsequent decision to apply the amendment for some widows whose rights had already vested, but not for Petitioner, the Board breached their fiduciary duty to Petitioner and others and established anew that they were continuing to apply their systemic policy of discrimination on the basis of marital status.

Application of the statute of limitations to a challenge of the continued and renewed application of a facially discriminatory plan provision is clearly erroneous in view of this Court's direction in the *Lorance* case. It works a manifest injustice on the Petitioner and other similarly situated individuals because they are being denied benefits month after month because of marital status. In that respect, this situation is like an equal pay case, such as *Bazemore v. Friday*, 478 U.S. 385 (1986); the discrimination reoccurs as each monthly benefit payment comes due, but is not paid, because of marital status.

The decision in the circuit court below conflicts with the standard for continuing violations that has been adopted by the Sixth Circuit and the Ninth Circuit. In *Dixon v. Anderson*, 928 F.2d 212, (6th Cir. 1991) also a pension case, the court held that even where an "overarching policy" of alleged discrimination had been proved, there still must be a specific allegedly discriminatory act against plaintiff within the relevant limitations period measured back from the date of the complaint.

Here, there was just such a specific discriminatory act. The Board drafted and submitted to the members for approval an amendment that removed the marital status condition from the Pension, Plan B. Pursuant to the terms of the Pension, Plan B, Petitioner requested and was granted an evidentiary hearing as to continuation of her benefits. The Board deliberated for two months before denying Petitioner's claim to benefits on the basis of the amendment on May 11, 1989. Petitioner filed her lawsuit on May 10, 1990, within one year from the date of the Board's final denial of benefits and well within any of the applicable statutory periods for any of Plaintiff's causes of action. The Board's refusal to apply the amendment for Petitioner's benefit while applying it for the benefit of others who vested prior to the effective date of the amendment constituted a new, but related, act of discrimination that occurred on May 10, 1989. Such new act of discrimination, when considered in the context of the facially discriminatory Plan B language that was the basis for the initial withholding of benefits clearly demonstrates both the existence of an "overarching policy" and a specific allegedly discriminatory act against Petitioner within the statutory period. Thus, this case satisfies all of the "continuous violation" requirements set forth by the Sixth Circuit in *Dixon v. Anderson*, 928 F.2d 212 (6th Cir. 1991).

Those same facts satisfy the Ninth Circuit requirement for a "systemic violation". In *Green v. Los Angeles City Superintendent of Schools*, 883 F. 2d 1472 (9th Cir. 1989), the court held that a continuing violation could be established by demonstrating a series of related acts against a single individual. Here, there have been two specific acts of discrimination on the basis of marital status against Petitioner: the first when her benefits were initially withheld in 1986 and the second on May 10, 1989, when the Board ruled that the amendment removing the marital

condition did not apply to her. While both of those discriminatory acts became final on the same date, May 10, 1989, such acts were still two separate decision points and actions taken by the Board at different times, constituting two separate discriminatory acts. Thus, Petitioner qualifies under the *Green* standard because there have clearly been two discriminatory acts against Petitioner, the first initially occurring in 1986, but only becoming final in 1989; the second initially occurring and becoming final in 1989.

Under *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983) *cert. denied*, 479 U.S. 868 (1986) wherein the much more stringent Fifth Circuit standard is explained, Petitioner should also have prevailed. Even if the initial withholding of benefits in 1986 could be viewed as having sufficient finality to have triggered Petitioner's awareness of and duty to assert her rights, the amendment to the Plan in 1988 certainly raised a question as to whether it created a new and independent claim for benefits for Petitioner under Plan B. The Board's decision in drafting the ballot language and in interpreting the amendment not to apply to those who had already remarried constituted a new act of discrimination that should have satisfied the *Berry* standard.

Based upon the language of the 1988 amendment to Plan B, Petitioner surely was entitled to at least litigate the question as to whether that amendment created a renewed right to benefits for Petitioner under Plan B. Yet, the United States District Court for the Northern District of Texas ruled that Petitioner had no standing to litigate that issue and the Fifth Circuit Court simply resolved that fact issue in movant's favor to sustain a summary judgment against Petitioner on that issue.

A Fifth Circuit case clearly demonstrates the factual distinction between claims based upon past pension rights

and claims based upon present pension rights and the impact on standing of those two different types of claims. *Joseph v. New Orleans Elec. Pension*, 754 F.2d 628 (5th Cir. 1985), *cert. denied*, 474 U.S. 1006 (1985).[2] In that case a group of retirees accepted lump sum retirement benefits in lieu of a continuing monthly benefit that might have yielded a smaller sum. More than seven months after they made their lump sum election, the Trustees amended the pension plan to increase benefits eight fold, but made the amendment retroactive for only the prior seven months. A group of lump sum retirees who retired prior to that seven month period filed suit ("Plaintiff-Retirees"). The Plaintiff-Retirees in the *Joseph* case were found not to have standing as a "participant" or "beneficiary" under the specific

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[2]Although the *Joseph* case is a case under the Employee Retirement Income Security Act of 1974 (ERISA), Petitioner does not now, and has not in the past, taken the position that the Fund is subject to ERISA. However, the legal theory in ERISA cases certainly can be applied to non-ERISA cases,if it fits the fact situation. The facts in the *Joseph* case are comparable to the facts of this case, except that language of the *Joseph* Plan was explicit as to which retirees were affected by the Amendment and the Plan B language here is not explicit. The *Joseph* case is used to demonstrate that, whereas there was no doubt that the Non-Plaintiff Retirees in that case were covered by the explicit terms of their Plan, their standing to challenge denial of benefits under that amendment arose only at the time the amendment became effective. Here, Petitioner's standing to litigate her claim that she is covered by the terms of that amendment also arose only upon the effective date of the amendment. This analogy does not rely upon the specific provisions of ERISA, but upon the legal reasoning applied to facts created by ERISA. That legal reasoning is applicable here.

provisions of ERISA because they had retired more than seven months prior to the amendment, had accepted all benefits due them under the plan as a lump sum and, therefore, had no reasonable expectation of present or future benefits.[3]

Consider, however, the lump sum retirees in the *Joseph* case who had retired within that seven month period ("Non-Plaintiff Retirees") prior to the amendment that allowed them to receive the increased benefits. They, too, had received all benefits due them under the terms of the plans as of the date that they received their lump sum. At that point, they would have had no standing to challenge changes to the plan after that time, if those changes did not affect them. However, the amendments restored their standing as of the date of the amendment because the amendments gave them a present right to benefits under the Plan. Prior to the effective date of the 1988 amendment, Petitioner's position in regard to standing was just like that of the Non-Plaintiff Retirees in the *Joseph* case during the seven months prior to the amendment to their plan; like those Non-Plaintiff Retirees, her standing to claim a present right to benefits pursuant to the amendment arose on the effective date of the amendment.

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[3]However, the Court in the Joseph case stated that: "Nor do we speak to whether lump-sum retirees might state a claim for relief under ERISA on either the contractual basis that a plan prohibits unequal retroactive distribution of benefits or the statutory basis that trustees are not to discriminate within classes of participants or beneficiaries." 754 F.2d 628, 630. As earlier noted, the Court below also sustained Summary Judgments as to Petitioner's Constitutional claims of discrimination and unequal treatment under law, as well as Petitioner's claim for breach of fiduciary duty.

Appellant's claim of a second independent, though related act of discrimination in this case is based on the thesis that, like the Non-Plaintiff Retirees in the *Joseph* case, who accepted their lump sums within the seven month window, she is, or arguably could be, the beneficiary of a new right under the Plan. The 1988 amendments appeared to establish her right to receive benefits prospectively if one just considers at the clear words of Plan B as amended.[4]

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[4]The relevant part of Plan B, Section 6.07 (d)(1) reads as follows:

"(d) Survivor benefits shall be paid to all qualified survivors of members of this pension plan subject to the following conditions:

...

The qualified surviving spouse shall be eligible to receive benefits for the remainder of such survivor's life."

The requirements for a "qualified surviving spouse" are spelled out in Section 6.07 (c)(1), which reads as follows:

"Qualified survivors or members of this Plan who shall be eligible for survivor benefits shall include the following:

(1) The surviving spouse of the member, providing the marriage took place before the member ended his employment with either department, either voluntarily or involuntarily, and further provided that the surviving spouse was legally married to the member at the time of the member's death."

It is undisputed that Petitioner was married to Mr. Russell for the entire thirty-four years that he was employed by the Dallas Fire Department and was married to Mr. Russell at his death.

The holding of the Trial Court below denied Appellant the right to litigate her claim of a present right to benefits under the Plan, merely because her benefits had been terminated at an earlier date under a facially discriminatory provision and the Board, after careful deliberation, decided to continue its enforcement of that facially discriminatory provision.

The Fifth Circuit did not reach the issue of standing because the court examined some, but not all, of the extrinsic record evidence regarding passage of the amendment to conclude that "No fair reading of either the Plan B amendment or the ballot could result in the conclusion that the amendment was applicable to anyone other than a surviving spouse receiving benefits on the effective date of the amendments, "i.e. April 21, 1988." Such erroneous conclusion cannot be supported by a single word in the actual Amendment to Section 6.07 of Plan B of the Fund. [See Section K of the Separate Appendix at pages 40-46. Nor is it supported by any part of the amendment package sent to Members in advance of the vote on the amendments, (R. Vol. II, pp. 389-416, Entry 50, *Response and Brief in Opposition to Plaintiff's Motion for Summary Judgment*), except for one line on the Ballot itself. The first item in that package, a letter to Members announcing proposed amendments, dated March 18, 1988, states that: "A short description of each proposed amendment follows. This is only a synopsis. Please read the actual Plan language for details." The short description, referred to above, for Ballot Item 6, (the amendment at issue here) reads as follows:

"Ballot Item 6

This amendment allows surviving spouses to continue receiving their benefits for life, regardless of whether or not

they remarry. Currently, if they remarry, their benefit is stopped."

The establishment of a new and independent cause of action, based upon the Board's decision to continue to apply the facially discriminatory marital status condition against Petitioner and other similarly situated widows is not dependent upon Petitioner prevailing on her claim that she was entitled to benefits under the Plan, as amended. All that is required is that the amendments created a colorable claim that Petitioner was entitled to benefits pursuant to the amendment. If Petitioner had even a colorable claim that the amendment created a renewed right for her to draw benefits under Plan B, then the Board's action in deciding, after serious deliberations to continue to enforce the marital status condition against her was a new and independent, though closely related, act of discrimination. The clear words of the Plan, as amended, created a more than colorable claim that the amendment gave Petitioner a new right to benefits under the Plan. Therefore, Petitioner's second cause of action accrued on May 10, 1989 when the board denied her claim to benefits under the 1988 amendment. Such Board action also established a continuing pattern of serial and systemic discrimination on the basis of marital status.

Thus, there are clearly two separate and distinct (although related) acts of discrimination taken by the Board of Trustees against Petitioner. The first occurred in 1986 when her benefits were initially withheld because of her remarriage. That initial act of discrimination was on the basis of a clearly stated, facially discriminatory, Plan provision. The second act of discrimination when the Board, after careful consideration of Petitioner's more than colorable claim to be entitled to benefits under the clear terms of the Plan, as amended, denied that claim, too.

This was not a situation analogous to the facts in *Delaware State College v. Ricks*, 449 U. S. 250 (1980), where the initial denial of tenure was the sole discriminatory act. Here, the Board was required by the terms of Plan B to give Petitioner opportunity for hearing and its initial discriminatory act of withholding of benefits, according to Section 6.07 of Plan B, did not become final until after the Board conducted the Section 6.07 (d)(3) hearing and finally responded to that request for continuation of benefits.

Further, the Board's active consideration of Petitioner's claim at the Section 6.07 (d)(3) evidentiary hearing and its deliberations on at least one and perhaps two other occasions, resulting in the decision that the 1988 amendment did not apply to Petitioner and that the Board would continue to enforce the remarriage condition against Petitioner, constituted a separate and distinct act of discrimination that gave rise to a new and independent cause of action well within the statutory period. In such respect, this case is much like *Griffen v. Big Spring Independent School District*, 706 F.2d 645 (5th Cir. 1983) *cert. denied*, 464 U.S. 1008 (1983) where a school teacher was notified by the local board of education that his contract would not be renewed. He subsequently sought a hearing and the school board provided him with a hearing, but refused to take any action that would lead to a renewal of his contract.

Similarly, in this case, the initial act of discrimination could be described as beyond the statute of limitations date (if it were deemed to be final in 1986); but the hearing date was well within the limitations period. The court in the *Griffen* case held that, because the Board was by its own rules obligated to provide a hearing and because the decision to preserve the status quo may have been discriminatorily motivated, the teacher had alleged a cause of action accruing on the date of the hearing that would

withstand a plea of limitations. In that case, the school board merely took no action at the hearing, allowing the earlier decision to stand.

In Petitioner's case, the Board was also required by the terms of Plan B to provide a hearing. Here, though, the Board deliberated about Petitioner's claim on at least two occasions and made the affirmative decision to continue to discriminate on the basis of marital status. Thus, Petitioner's case establishing a second discrete (though related) act of discrimination within the statutory period is much stronger than the Plaintiff's case in *Griffen*, because the Board actively deliberated and finally denied Petitioner's claim at the May 10, 1989 meeting, rather than just taking "no action" as did the school board in the *Griffen* case.

Even though it determined that a continuing violation had not been proved, the circuit court should have reached the same result here as in the *Griffen* case. The circuit court did not reach that result because of the Court's factual determination that "no fair reading of the Plan B amendment or the ballot could result in a conclusion that the amendment was applicable to anyone other than a surviving spouse receiving benefits on the effective date of plan amendment."

Such conclusion was not so rapidly reached by the Board itself. As previously stated, the Board tabled the request at the March meeting for further deliberations and did not reach a final decision until the May 10, 1989 Board meeting.

Any truly "fair" reading of the 1988 amendment would have to conclude that the purpose of the amendment was to correct the facially discriminatory aspect of the Plan. One would not readily assume then, that the replacement language would be intended to perpetuate the facially

discriminatory provision as to some, but not all, widows who had already vested under the Plan, prior to the date of the amendment.

2. The decision below erroneously determined the date of accrual of Petitioner's causes of action and such erroneous decision endangers national policies protecting individual rights and disfavoring restraints upon the fundamental right to marry by allowing the statute of limitations to block a challenge to a facially discriminatory provision that openly and obviously discriminates upon the basis of marital status.

The Board's initial discriminatory act of withholding Petitioner's benefits because of her remarriage did not become final until May 10, 1989. Petitioner did not exercise her Plan B right to challenge that initial denial of her benefits in 1986 until she requested an evidentiary hearing in 1989. Under the terms of Plan B as it existed at the death of Petitioner's husband, (Separate Appendix, pages 32-36, Section I) and Plan B, as amended, (Separate Appendix, pages 40-46, Section K), Petitioner was at all times entitled to an evidentiary hearing before the Board if she wanted to challenge the withholding of her benefits. There is no time limit on that right to demand and receive a hearing before the Board and Plan B clearly states that "Following such a hearing, the decision of the Board regarding benefits shall be final." (Id.). Thus, even the initial withholding of benefits in 1986 did not become final, under the terms of Plan B, until after the evidentiary hearing and final denial of benefits by the Board on May 10, 1989.

On that date, Petitioner argued that the initial withholding of benefits was a denial of her constitutional rights, but also argued that under the terms of the Plan, as

amended, she was presently entitled to benefits under the Plan, irrespective of the merits of her claim that the initial withholding of benefits was unlawful. The Board issued a final ruling on all of Petitioner's claims on May 10, 1989.

Federal case law supports Petitioner's position that all of her causes of action accrued on May 10, 1989. Petitioner, at her husband's death, vested under the terms of the Fund, Plan B and became the beneficiary of that express trust. In order to start the statute of limitations running against an express trust, there must be a clear and continuing repudiation of the right to trust benefits. *Kosty v. Lewis*, 319 F.2d 744, 750 (D.C. Cir. 1963) *cert. denied*, 375 U.S. 964 (1964). That clear and continuing repudiation of the right to trust benefits did not occur in this case until May 10, 1989. Pursuant to the terms of Plan B, Section 6.07 (d)(3), the Board's initial action in withholding benefits from 1986 forward and its subsequent decision to refuse application of the 1988 amendment for benefit of Petitioner both became final on that date. Petitioner filed suit within one year from that date, well within all statutory periods found applicable to this case by the lower courts.

The right to marry is a fundamental right.[5] The Firemen, Policemen and Fire Alarm Operator's Pension Fund is not the only pension fund that provides for widows to lose their pensions upon remarriage. If this Court reverses the decision below and returns this case to the trial court for trial, such ruling will not, of course, automatically invalidate such marital condition clauses. But it will render such clauses subject to judicial scrutiny to determine if, in fact, such discrimination is justified based upon factors such as those identified by this Court in *Califano v. Jobst*, 434

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[5]*Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

U.S. 47 (1977). If, as here, the Fund has prospered and benefits are being continually increased, then such discrimination cannot be justified, particularly when weighed against the national policy.

3. This Petition should be granted because this decision expands the standard for summary judgment in federal courts far beyond the standard set by this Court in the summary judgment trilogy of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex v. Catrett*, 477 U.S. 317 (1986)("Summary Judgment Trilogy"). The circuit court in this case went beyond resolution of legal issues in resorting to consideration of extrinsic evidence to determine the intent of the firemen and policemen who voted on the 1988 amendment for the purpose of construing Plan B of the Fund. The circuit court also erroneously based its decision on the "post-1988 claims" on the flawed application of a retroactivity analysis to the facts of this case.

Three separate documents were distributed to the Members prior to the vote approving the amendment to Section 6.07. (R.Vol. II, pp. 389-416, Entry 50, *Response and Brief in Opposition to Plaintiff's Motion for Summary Judgment*). The Fifth Circuit considered one of those documents, the ballot, and concluded that the "intent" was for the amendment to apply only to widows receiving benefits on the effective date of the Plan. The court also applied a "retroactivity" analysis to support that conclusion.

Based upon that conclusion, the Court found all of Petitioner's "post 1988 complaints" to be time barred. Such analysis is fatally flawed for at least three reasons. *First*, the Court improperly resorted to evidence extrinsic to the terms of the Plan itself to construe the Plan. Interpreting a

writing that is unambiguous is clearly a question of law. *Sherman v. Mutual Benefit Life Ins. Co.*, 633 F.2d 782, 784 (9th Cir. 1980). But where the intent of the parties to an ambiguous writing is at issue and the evidence is, as here, in conflict, there is an issue of fact. *Laborer's Health and Welf. Tr. Fund v. Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983). Here, although the circuit court never pronounced the language of Plan B to be ambiguous, it resorted to extrinsic evidence (the ballot) to construe the terms of the Plan. However, this is a situation where different inferences could be drawn from a careful evaluation of the documents submitted to the firemen and policemen as to the intent of those members in voting for the 1988 amendment. Thus, determination of that intent was a fact question which the circuit court improperly resolved in favor of the moving party to sustain the summary judgments against Petitioner.

The "intent" in this case, like in a labor negotiation case, is a combination of the intent of the Members in voting on the Plan and the Board's intent when they drafted the amendments. In order to fairly determine the intent of the Members in passing the amendment, all of the materials submitted to the members would have to be considered and all of those materials were in the Record. However, the Court reached its decision based only on a note on the ballot which might be indicative of the Board's intent, but which, standing alone, cannot resolve the fact issue as to what each member understood and intended when he/she voted on the 1988 amendment. The actual Plan language or the actual amendment itself (lining out the remarriage condition) could not have been considered because there is nothing in the simple deleting of the words embodying the marital condition in Plan B that would have given anyone any indication that it would apply for some widows whose rights under Plan B had previously vested, but not for all such

widows. Nor was the "Ballot Explanation" directive to the Members explicit on that point. It read:

> "The following is just a summary to explain each ballot item. For exact details and Plan language, please refer to the Plan sections listed under each ballot item."

The summary for Ballot Item No. 6 reads as follows:

> "This amendment allows surviving spouses to continue receiving their benefit for life, regardless of whether or not they remarry. Currently, if they remarry, their benefit is stopped."

The notation at the top of the Plan Section to which the Ballot Explanation directed members reads as follows:

> "(The following changes made herein shall apply to all current Plan B active members, retirees, and survivors; the effective date of the amendment is _____, ____, 1988 (the date that the Board certifies the election results). (See Separate Appendix, pp. 37-39, Section J)."

Nothing in the actual Plan language limits applicability of the amendment to those receiving benefits on the effective date of the amendment. To go beyond the clear language of the Plan itself for the purpose of determining the intent of the Members in passing the amendment, one would need to know the sequence in which the materials were received, whether Members studied and discussed the materials, whether Members just followed the Board's instructions to go to actual Plan language, etc.

Not all of that evidence as to sequence and effect was before the Court below, but all three of the documents submitted to the Members were in the official record. It is a very dangerous precedent to set when the court substitutes its judgment for a jury on a crucial issue, especially when that judgment is based upon only a part of the record evidence and the court then resolves that disputed fact issue in favor of the movant to sustain a summary judgment.

Second, the Court's "retroactivity" analysis is flawed because it is the date of vesting that determines applicability of plan changes, not the monthly receipt of benefit checks. Thus, if the 1988 amendment is being applied for benefit of widows whose husbands died prior to 1988, then it is being applied retroactively. As the Board itself argued in page 29 of its circuit court brief herein, Petitioner's rights under the plan became "fixed and determined upon her husband's death in 1981." If that is true, then it is also true for all other widows whose husbands died prior to 1988.

Yet, according to the circuit court's ruling upholding the Board's administration of Plan B based upon a notation of effective date on the ballot, that amendment *is* today being retroactively applied for other widows whose rights became "fixed and determined" on the dates of their husband's deaths prior to April 21, 1988, so long as they were still receiving benefits on April 21, 1988 or after. The denial of benefits to one widow whose rights became "fixed and determined" in 1981 cannot be justified based upon case law regarding retroactivity of statutes, when other widows whose rights also vested in 1981 are being given benefit of the amendment.

The 1988 amendment must either apply for benefit of all widows who vested prior to 1988 or it does not apply for any widows who vested prior to 1988 under the clear

rules of construction set out in each and every one of the pension cases cited by the Board below.[6] Under applicable Texas case law on retroactivity involving this very Fund, the 1988 amendment would not be deemed unconstitutionally retroactive merely because it conditions present payment of benefits on past events. *Byrd v. City of Dallas*, 6. S.W.2d 738 (Tex. Com. App. 1928); and *City of San Antonio v. Baird*, 209 S.W.2d 224 *writ ref'd.* (Tex. Civ. App. San Antonio 1988).

The Court's retroactivity analysis is flawed because it erroneously focuses on the receipt of monthly checks instead of the date of vesting to determine retroactivity. It proclaims that the 1988 amendment cannot apply for benefit of Petitioner because such application would be retroactive, without recognizing that the Board's present application of the 1988 amendment for benefit of other widows who vested prior to 1988 is also retroactive. Thus, it cannot be argued that there was no "intent" for the amendment to be applied retroactively, if the Board's present manner of administering the Plan is to be upheld.

Finally, the Court's conclusion is also clearly erroneous because it ignores Petitioner's breach of fiduciary

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[6]See, for example, *Burgess v. City of Detroit*, 102 N.W.2d 483 (Mich. 1960), *Miner v. Stafford*, 157 N.E. 164 (Ill. 1927), *Linaka v. Firemen's Pension Fund of Philadelphia*, 31 A.2d 122 (Pa. 1943) and In Re *Ross*, 207 P.2d 254 (Okla. 1948), holding that pension terms become fixed for widows on the date of the member's death; See also *Atchison v. Retirement Board of Police Retirement System of Kansas City*, 343 S.W.2d 25 (Mo. 1960), and *Pitts v. City of Richmond*, 366 S.E.2d 56 (Va. 1988), holding that pension terms become fixed on the date of the member's retirement.

duty claim. The trustees had a fiduciary duty to Petitioner to treat her in the same manner as they treated other similarly situated widows.[7]

Therefore, even if the Court correctly determined that the amendment could not have been applied retroactively, such ruling still would not dispose of Petitioner's breach of fiduciary duty and unequal treatment causes of action that only accrued on May 10, 1989, when the Board finally denied the benefits of the amendment to Petitioner, while applying that amendment for benefit of other widows whose benefit rights under the Fund had also vested prior to the effective date of the amendment.

In drafting the language of the amendment and then interpreting it to apply only to those still receiving benefits on the effective date of the amendment, the Board treated Petitioner and the few other widows who had remarried prior to that date differently from other widows whose rights under the Plan had vested on or about the same date as the widows who had remarried. As the Board construes the Plan, the widow of a Member who went to work on the same date as Petitioner's husband, paid in the same contributions, retired on the same date and died on the same date as Petitioner's husband, could have her benefits continued despite her remarriage, while Petitioner is being denied benefits on the basis of her remarriage. The only difference between the two situations would be the date of remarriage. That cause of action for a breach of fiduciary duty and unequal treatment under Section 1983 did not arise until the amendment was passed and was interpreted by the Board not to apply to widows who had remarried prior to the effective date of the amendment, but to have application

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[7]*Kosty v. Lewis*, 319 F. 2d 744 (D.C Cir. 1963) *cert. denied*, 375 U.S. 964 (1964).

for benefit of other widows whose rights had also vested prior to the date of the amendment, but who had not yet remarried.

The Board has cited numerous cases where benefits had been changed for some, but not all retirees. However, in all of those cases the applicability of the changes were tied to the date of vesting, not to whether benefits were being received on the effective date of the change.

The trial court's decision that Petitioner had no standing to challenge that inequity once her benefits were discontinued was just as erroneous as the Fifth Circuits' resolution of disputed facts to reach the same result. As the Board itself argued on page 29 of its circuit court brief, Petitioners rights under the Plan were set when she vested at her husband's death. It is the date of vesting that controls the applicability of plan provisions. Yet the Board, apparently for its own convenience, simply applied the 1988 amendment for benefit of all who were currently receiving benefits on the effective date of the amendment, even though their rights, as well as Petitioner's rights under the Plan, had been set by the terms of the Plan as it existed on the date of their husband's deaths. That disparate treatment did not occur until after the effective date of the amendment and was not final until Petitioner's claim for benefits under the 1988 amendment was finally denied on May 10, 1989.

If, in fact, the circuit court is right that the 1988 amendment, as approved, applies for benefit of all widows receiving benefits on that date, but not for Petitioner and others who remarried before that date, then such ruling adds strength to Petitioner's breach of fiduciary duty claim. It certainly cannot be said to dispose of that claim because it clearly establishes that the Board in drafting the 1988 amendment documents and in ruling on Petitioner's claim to

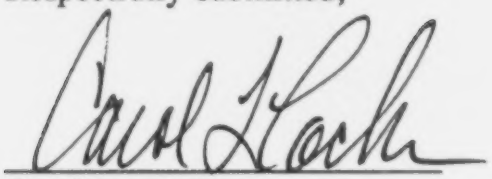
benefits under the amendment intentionally denied benefits to Petitioner, while paying benefits to other widows who also have remarried and who also vested before the effective date of the amendment. Such arbitrary and irrational discrimination between members of the same class of beneficiaries cannot be defended and certainly cannot correctly be disposed of by summary judgment.

A decision resolving disputed fact issues in favor of the movant, erroneously applying a retroactivity analysis to the facts of this case, and ignoring causes of action not disposed of by the court's analysis stretches this Court's federal summary judgment standard way beyond anything ever intended by the Summary Judgment Trilogy. Such precedent endangers the most fundamental right: the right to trial by jury and to have one's day in Court.

CONCLUSION

The decision below conflicts with decisions of this Court and other circuit courts on important federal questions and even conflicts with other decisions of the Fifth Circuit Court of Appeals on the same issues. Both courts below departed so far from the accepted and usual course of judicial proceedings in denying Petitioner the fundamental right to litigate her pension claim that this Court's power of supervision should be exercised. For the reasons stated in this Petition, Petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



Carol L. Tacker
State Bar of Texas
No. 19605600
208 S. Akard, Room 2900
Dallas, Texas 75201
(214) 464-2219

Counsel of Record

92-998

Supreme Court, U.S.
FILED
DEC 9 1992
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

ALMA FAYE RUSSELL, *Petitioner*

v.

CITY OF DALLAS AND THE BOARD OF TRUSTEES OF THE FIREMEN, POLICEMEN AND FIRE ALARM OPERATORS' PENSION FUND OF DALLAS, TEXAS, *Respondents*

APPENDIX

TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BARBARA R. HUNT
208 S. Akard
Room 2900
Dallas, Texas 75201
214/464-7551
Of Counsel

CAROL L. TACKER
208 S. Akard
Room 2900
Dallas, Texas 75201
214/464-2219
Counsel of Record

December 9, 1992

SECTION A

Alma Faye RUSSELL, Plaintiff-
Appellant,

v.

BOARD OF TRUSTEES OF THE FIREMEN, POLICEMEN AND FIRE ALARM OPERATORS' PENSION FUND OF DALLAS, TEXAS,–and City of Dallas, Defendants-Appellees.

No. 91-1843.

United States Court of Appeals,
Fifth Circuit.

Aug. 14, 1992.

Widow of deceased fire fighter brought suit to have benefits, which were terminated upon remarriage, reinstated following divorce. The United States District Court for the Northern District of Texas, Robert B. Maloney, J., granted summary judgment in favor of pension plan trustees. Appeal was taken. The Court of Appeals, Little, District Judge, sitting by designation, held that: (1) claims alleging that plan was unlawful restraint on remarriage were barred by Texas statute of limitations; (2) alleged discriminatory act in terminating benefits due to remarriage was not continuing tort; and (3) amendment to pension plan permitting surviving spouses to receive benefits for life did not apply retroactively.

Affirmed.

1. Federal Courts *776

District court's grant of summary judgment is reviewed de novo. Fed.Rules Civ. Proc. Rule 56(c), 28 U.S.C.A.

2. Municipal Corporations *200(8)

Two-year Texas statute of limitations for torts applied to claim by Texas domiciliary alleging that surviving spouse provision of firemen pension fund, which terminated spouse's benefits on remarriage, was unlawful restraint on remarriage. 42 U.S.C.A. § 1983; V.T.C.A., Civil Practice & Remedies Code § 16.003.

3. Limitation of Actions *95(1)

Two-year Texas statute of limitations for torts begins to run on federal claim when plaintiff is aware of suffering injury or has sufficient information to know of injury. V.T.C.A., Civil Practice & Remedies Code § 16.003.

4. Municipal Corporations *200(8)

Claim by surviving spouse, that termination of fire fighter's pension benefits upon remarriage was unlawful restraint on remarriage, was untimely under Texas statute of limitations for torts when commenced more than two years after date of remarriage. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14; V.T.C.A., Civil Practice & Remedies Code § 16.003.

5. Municipal Corporations *200(8)

Breach of contract claim by surviving spouse, that fire fighter pension benefits were improperly terminated upon her remarriage, was untimely under Texas statute of limitations, when commenced more than four years after

date of remarriage V.T.C.A., Civil Practice & Remedies Code § 16.004.

6. Limitation of Actions *55(6)

Under Texas law, whether continuing tort suspended running of statute of limitations is determined by examining whether original discriminatory act had degree of permanence that should trigger claimant's awareness of and duty to assert rights.

7. Limitation of Actions *55(6)

Allegedly discriminatory act of terminating surviving spouse's fire fighter pension benefits due to claimant's remarriage was not continuing tort under Texas law, which suspended running of statute of limitations, since act of terminating benefits upon remarriage was accomplished only once and spouse's duty to assert any remaining rights commenced on date checks stopped.

8. Statutes *270

Under Texas law, amendment to statute is presumed not to apply retroactively. V.T. C. A., Government Code § 311.022.

9. Municipal Corporations *200(6)

Under Texas law, amendment to fire fighter pension plan, to provide benefits for life to surviving spouses, did not apply retroactively to spouse whose benefits had been terminated due to remarriage prior to amendment's effective

date. Vernon's Ann.Texas Civ.St.art. 6243a-1; art. 6243a, § 11B (Repealed); V.T.C.A., Government Code § 311.022.

Appeal from the United States District Court for the Northern District of Texas.

Before GARWOOD and DEMOSS, Circuit Judges, and LITTLE,[1] District Judge.

LITTLE, District Judge:

The widow of a deceased Dallas, Texas fireman seeks to have her terminated pension benefits restored. Thwarted in that endeavor by the district court's granting of summary judgments in favor of the trustees of the pension plan and the City of Dallas, the widow has appealed to this court. Finding no infirmity in the District Court's opinions, we AFFIRM the decisions for the following reasons.

I. FACTS

The facts of consequence are not in dispute. In 1976, Robert G. Russell retired from the Dallas, Texas Fire Department. Russell's years of service afforded him retirement benefits as provided by the Firemen, Policemen, and Fire Alarm Operators' Pension Fund (the Fund), Plan B (or the Plan).[2] The benefits survived Mr. Russell's

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[1]District Judge of the Western District of Louisiana, sitting by designation.

[2]Plan B is an uncodified pension plan that was created in 1973 by the voting members of the Fund. Plan B's creation

demise in 1981. Those benefits, in accordance with the Plan, were visited upon his widow, Alma Faye Russell.

The benefits terminated, again in accordance with the Plan provisions, when Alma Faye Russell remarried on 26 April 1986. The marriage ran aground and ended in divorce on 31 March 1988.[3] In February 1988, Russell sought reinstatement of Plan benefits reasoning that, upon divorce, she would reacquire widow status. The Board of Trustees (the Board) refused to reinstate Russell because the Plan specifically provided that benefits ceased upon her remarriage in 1986. According to the Plan, reinstatement was not authorized due to divorce from or death of the subsequent spouse.

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was authorized by Section 11B of the former Texas Revised Civil Statutes, Article 6243a, which allowed Fund members to create a separate pension plan by comprehensive amendment to the provisions contained in the statute. Prior to the creation of Plan B, two other separate pension plans, the "Old Pension Plan" and "Plan A," existed independently from, but under the authorization of, former Article 6243a.

On 14 June 1989, the Texas legislature enacted Article 6243a-1, the successor statute to Article 6243a. Labeled the "Combined Pension Plan," the new statute was intended to combine the Old Pension Plan and Plan A into one comprehensive plan. However, the vitality of Plan B was not threatened by the new statute, the sole purpose of which was to combine the two older pension plans. Hence, Plan B remains as a separate and uncodified pension plan, unaffected by the terms of the Combined Pension Plan.

[3]The appellant apparently reacquired the surname of Russell as a result of the divorce decree.

In April 1988, the extant members of the Pension Plan voted on a proposed Plan amendment. The voting was conducted by a written response to a written ballot. There is no dispute as to the language of the official ballot disseminated in the spring of 1988.

Voting instructions to members of the Police and Fire Pension Fund:

1. You must vote at your regularly assigned work location.
2. Sign the voter registration.
3. Vote INDIVIDUALLY on EACH amendment.
4. After voting, sign the ballot on the detachable part, detach at the perforation, and give it to the person that is in charge of the ballot box.
5. Place your ballot in the ballot box provided. These changes are authorized in each instance by either Section 11A and/or 11B of Article 6243a of the Revised Civil Status of the State of Texas, as amended, and will be incorporated into each Plan respectively, if passed by a majority of the Fund's active membership. The results will be officially canvassed and announced by the Police and Fire Pension Board at the April, 1988 Board meeting...
6. Amendment to provide the continuation of a surviving spouse's benefit for the surviving spouse's life, regardless of remarriage. *Effective on the date the Board certifies the election results (April Board meeting) for all surviving spouses receiving benefits on that date, and all future recipients.* (Emphasis supplied).

The landslide election results in favor of Plan amendment were unanimously certified by the Board on 21 April 1988, the date the amendment became effective. The plan, after the amendment, provided, in part.

(d) Survivor benefits shall be paid to all qualified survivors of members of this pension, subject to the following conditions:

(1) The qualified surviving spouse of the member shall be eligible to receive benefits for the remainder of such survivor's life.

By virtue of the April amendment, survivors' benefits would terminate on death only. Thus, termination by the first to occur of death or remarriage became a passe' standard.

Russell urged the Board that this new provision opened the door for her reinstatement. Her request for reinstatement, premised on the terms of the amendment, was denied as she was not in the category of individuals to whom expanded benefits were accorded, i.e. only those survivors *receiving benefits* would continue to receive benefits in the event of remarriage. Russell was not receiving benefits at the time of plan amendment and therefore she was not entitled to the expanded benefits.

Russell filed suit against the Board and the City of Dallas on 11 May 1990. Both defendants were dismissed by the district court after granting the summary judgment motion filed by each. The appeal we consider today was filed by Russell. We will address the appellant's complaints in serial fashion.

II. STANDARD OF REVIEW

[1] We review the district court's grant of summary judgment *de novo*, applying the same standard applied by the district court. *Wilson v. Job, Inc.*, 958 F.2d 653, 656 (5th Cir.1992). Hence, summary judgment will be proper if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Contrary to the assertions of appellant, the Plan is not controlled by the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). Rather, this is a "government plan" that is maintained exclusively for Dallas city employees and is specifically exempt from ERISA. 29 U.S.C. § 1002(32). Appellant's suggestion that we should follow the Supreme Court's dictate for review of ERISA plans is therefore rejected.

III. ANALYSIS

The judgment of the district court bisected Russell's complaints into distinct categories: those complaints as to the Plan conditions prior to the 1988 amendment, and those complaints as to the Plan conditions subsequent to the 1988 Plan amendment. We will follow the district court's methodology.

A. Appellant's Pre-1988 Complaints.

Essentially, Russell's pre-1988 complaints center around the Plan requirement that one must retain the status of a widow or widower to draw continuously benefits from the Plan. More plainly, Russell claims that the Plan provision was an unlawful restraint on remarriage, violative of 42 U.S.C. § 1983 and the 14th amendment, and was contrary

to public policy. Additionally, she alleges breach of contract and breach of fiduciary duty causes of action.

[2] Russell did not bring her claim until more than four years after the termination of her benefits. As is well established, the prescriptive period applicable to a § 1983 claim involving an action by a Texas domiciliary is governed by the applicable Texas statute of limitations concerning torts. *Jackson v. Johnson*, 950 F.2d 263, 265 (5th Cir.1992). Moreover, appellant's complaints founded upon violations of the state and federal constitutions and the public policy of the United States and Texas, as well as the allegations of a breach of fiduciary duty, are also governed by the tort statute. A two year period is the applicable Texas statute. Tex.Civ.Prac. & Rem. § 16.003.

[3] Although Texas law mandates the limitation period and tolling rules, federal law will dictate when a cause of action arises. *Jackson*, 950 F.2d at 265. Under federal law, the period begins to run "the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Rodriguez v. Holmes*, 963 F.2d 799, 803 (5th Cir.1992)(quoting *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir.1987).

[4] Russell was fully aware that she would lose her benefits after she remarried. The correspondence sent by Russell to the Board just prior to her remarriage reveals that Russell undoubtedly knew her benefits would terminate upon remarriage.[4] Pursuant to the provisions of the Plan,

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[4]In a letter to the Board dated 9 April 1986, Russell wrote:

she ceased to be a Plan participant on 26 April 1986, the date of her remarriage. In federal cases, the applicable statute of limitations is not tolled until the plaintiff's complaint is received by the court clerk. *Martin v. Demma,* 831 F.2d 69, 71 (5th Cir. 1987); Fed.R.Civ.P. 3. Thus, any complaint by appellant as to § 1983 violations, constitutional violations, public policy violations, misrepresentation or fiduciary duty violations concerning the denial of benefits upon a surviving spouse's remarriage accrued *on the date of remarriage* and would have expired more than two years prior to the filing of her suit on 11 May 1990.

[5] Applying the same date of accrual, Russell's breach of contract allegations are also barred by the applicable limitation statute. The only possible breach would have occurred when the board failed to pay Russell under the plan. Contracts are governed by a four year statute of limitations. Tex.Civ.Pract. & Rem.Code § 16.004. Russell did not commence her action by the 26 April 1990 deadline, and is therefore precluded by the limitations statute.

[6] Appellant describes the trustee's failure to pay each monthly benefit as a continuing violation that suspends the running of the statute of limitations until the payments are restored. Appellant's reliance on a continuing tort is misplaced. The test to be applied in analyzing the problem is that emanating from *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961

I'm planning to get married April 26, 1986. I want to let you know in advance so you can make the *final check* correct and won't have to be returned, etc. (emphasis added)

(1989), and summarized by this circuit in *Hendrix v. Yazoo City*, 911 F.2d 1102 (5th Cir.1990):

> As *Lorance* makes clear, the distinction does not turn on the type of discrimination, but on whether the practice at issue is part of or a repetition of a past discriminatory act, in which case there is a continuing violation, or whether it is facially neutral, simply giving effect to prior discrimination, in which case there is no continuing violation.

Id. at 1104. Put succinctly, the question is: did the original discriminatory act have the degree of permanence that should trigger the claimant's awareness of and duty to assert her rights. *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir.), *cert. denied*, 479 U.S. 868, 107 S.Ct. 232, 93 L.Ed.2d 158 (1986).

[7] As we have said, the discriminatory act was the termination of benefits due to claimant's remarriage. We have also recognized that appellant was unquestionably aware that her remarriage would and did sever her benefits. Her duty to assert any remaining rights in the Plan commenced on the date she stopped receiving checks.

Yet, she took no action after the checks stopped. It was not until she had filed for divorce that Russell decided to "reapply" for benefits--apparently in the mistaken belief that her return to widow status would qualify her for reinstatement. On the basis of the unambiguous terms of the Plan, the Board declined to reinstate appellant. The Board's act of terminating of Russell's benefits upon remarriage was not revisited after her divorce, it was

accomplished only once. Clearly, this is not a case involving a continuous tort.

B. Appellant's Post-1988 Complaints.

Russell reasons that she is a qualified surviving spouse (married to the member at the time of the member's death) and that the Plan B language, as amended on 26 April 1988, afforded her entitlement to benefits after that date. Again, we disagree.

[8,9] No fair reading of the either the Plan B amendment or the ballot could result in a conclusion that the amendment was applicable to anyone other than a surviving spouse receiving benefits on the effective date of plan amendment, i.e., 21 April 1988. Not only does the ballot itself specifically exclude benefits to those surviving spouses not receiving benefits as of the effective date, but the applicable Texas law requires a prospective application of the language creating plan amendment. Under Texas law, "[a] statute is presumed to be prospective in its operation unless expressly made retroactive." Tex. Gov't. Code Ann. § 311.022 (Vernon 1988). It follows, of course, that amendments are also presumed not to apply retroactively. *Skoczylas v. Federal Bureau of Prisons,* 961 F.2d 543, 554 (5th Cir. 1992); *Houston Indep. School Dist. v. Houston Chronicle Pub. Company,* 798 S.W.2d 580, 585 (Tex. App. 1990, *writ denied*).

Plain and simple, the clear language of the ballot expanded the class of beneficiaries only to those spouses receiving benefits as of 22 April 1988. To read the language more broadly would lead to absurd and unintended consequences. Because we find no issue as to any material fact as to whether Russell was retroactively covered by the Plan B

amendment, it is unnecessary to consider the district court's holding that appellant lacked standing to challenge the post amendment actions of the Board.

IV. CONCLUSION

The district court did not err in granting summary judgment against appellant on all issues. Were we to rule in favor of appellant on any issue, we may have had to consider the validity of the dismissal of the City of Dallas by the district court. We need not consider the liability of the City of Dallas as we have affirmed the district court's determination that there was no genuine issue as to any material fact that plaintiff's rights as a beneficiary in the Plan terminated on 26 April 1986 and that all possible causes of action have prescribed.

The summary judgments are AFFIRMED.

SECTION B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-1843

ALMA FAYE RUSSELL,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF THE FIREMEN, POLICEMEN AND FIRE ALARM OPERATORS' PENSION FUND OF DALLAS, TEXAS, and CITY OF DALLAS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(September 10, 1992)

Before GARWOOD and DEMOSS, Circuit Judges, and LITTLE,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

REHG-4

*District Judge of the Western District of Louisiana, sitting by designation.

SECTION C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

ALMA FAYE RUSSELL,

Plaintiff,

v. CA 3-90-1139-T

THE BOARD OF TRUSTEES OF
THE FIREMEN, POLICEMEN AND
FIRE ALARM OPERATORS PENSION
FUND OF DALLAS, TEXAS,

Defendant.

JUDGMENT

This action came on before the court on Defendant City of Dallas' Motion for Summary Judgment, Honorable Robert B. Maloney, District Judge, presiding, and the issues having been duly considered and a decision having been rendered,

It is **ORDERED and ADJUDGED** that this action is dismissed with prejudice as to the City of Dallas.

It is further **ORDERED** and **ADJUDGED** that all relief not specifically granted herein is denied.

SIGNED on this the 17th day of July 1991.

/s/
Robert B. Maloney
U. S. District Judge

/s/
JUDGMENT

SECTION D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

ALMA FAYE RUSSELL,

Plaintiff,

v. CA 3-90-1139-T

THE BOARD OF TRUSTEES OF
THE FIREMEN, POLICEMEN AND
FIRE ALARM OPERATORS PENSION
FUND OF DALLAS, TEXAS,

Defendant.

FINAL JUDGMENT

This action came on before the court on Defendant's Motion for Summary Judgment, Honorable Robert B. Maloney, District Judge, presiding, and the issues having been duly considered and a decision having been rendered,

It is **ORDERED and ADJUDGED** that this action is dismissed with prejudice.

It is further **ORDERED** and **ADJUDGED** that all relief not specifically granted herein is denied.

SIGNED on this the 17th day of July 1991.

/s/_____
Robert B. Maloney
U. S. District Judge

/s/_____
FINAL JUDGMENT

SECTION E

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

ALMA FAYE RUSSELL,

Plaintiff,

v. CA 3-90-1139-T

THE BOARD OF TRUSTEES OF
THE FIREMEN, POLICEMEN AND
FIRE ALARM OPERATORS PENSION
FUND OF DALLAS, TEXAS,

Defendant.

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

This case is before the court on Defendant Board of Trustees October 19, 1990 Motion for Summary Judgment. After considering the motion, response, and the applicable legal authorities the court is of the opinion that the motion should be granted, and that this matter should be dismissed.

ORDER GRANTING SUMMARY JUDGMENT

Background

Plaintiff commenced this action on May 10, 1990, seeking recovery of pension benefits which she contends Defendant wrongfully denied her by conditioning continued receipt of the benefits on her remaining single after the death of her husband in 1981. After she remarried in 1986, Plaintiff's benefits were discontinued under the terms of the pension plan. Plaintiff's complaint alleges claims based on 42 U.S.C. § 1983, the United States and Texas constitutions, breach of contract, breach of fiduciary duty, and misrepresentation.

Defendant's motion seeks dismissal on statute of limitations grounds. Alternatively, Defendant contends that Plaintiff cannot meet her burden of establishing the unconstitutionality of the pension plan provisions which she challenges, and that she lacks standing to assert the remainder of the claims asserted in her complaint.

Summary Judgment Standard

Summary judgment should only be entered where the record establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant bears the burden of establishing the propriety of summary judgment. Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986).

Once a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L. Ed.2d 202 (1986). The substantive law will identify what facts are material. Id. at 248. A dispute as to a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. at 248.

Discussion

Statutes of Limitation

Plaintiff's claims depend on her ability to establish that she was improperly denied benefits to which she was entitled upon her remarriage on April 26, 1986. Unless Plaintiff can avoid summary judgment on this issue, Plaintiff lacks standing to challenge any further action taken by Defendant, as she would no longer be considered a beneficiary under the plan. See, Dallas Gay Alliance v. Dallas County Hospital District, 719 F. Supp. 1380, 1383-86 (N.D. Tex. 1989); and Harvey v. Casebeer, 531 S.W.2d 206, 208 (Tex. Civ. App.--Tyler 1975).

Plaintiff contends that Defendant unlawfully conditioned her continued receipt of survivors' benefits upon her remaining single after the death of her husband. Plaintiff contends that this policy, memorialized in § 6.07 of the relevant plan language, was an unlawful restraint on marriage, violated 42 U.S.C. § 1983 and the 14th Amendment, and was contrary to public policy.

The timeliness of Plaintiff's claim under 42 U.S.C. § 1983 is governed by the applicable Texas statute of limitations concerning personal injury. Wilson v. Garcia, 471 U.S. 261 (1985). Tex. Civ. Prac. and Rem. Code § 16.003 provides a two year limitation period for personal injury claims. The court concludes that Plaintiff's § 1983 claim accrued on April 26, 1986, the date she remarried and stopped receiving survivor benefits. As Plaintiff did not commence this action until May 11, 1990, her § 1983 claim is barred by the applicable limitation period.

Plaintiff's remaining constitutional claims regarding the validity of Plan § 6.07 are also governed by a two year statute of limitations. See Moore v. El Paso County, 660 F.2d 586, 589 (5th Cir.) cert. denied 459 U.S. 822 (1982). The court concludes that these claims accrued on April 26, 1986, and that the claims are, therefore, barred by the applicable two year statute of limitations under Tex. Civ. Prac. and Rem. Code § 16.003.

Plaintiff's remaining claims are based on events and amendments to the plan which occurred after April 26,1986. The court concludes that she lacks standing to maintain these claims. Defendant's motion for summary judgment will, therefore, be granted, and this action will be dismissed with prejudice.

It is therefore **ORDERED** that Defendant Board of Trustees October 19, 1990 Motion for Summary Judgment is granted, and that this action is dismissed with prejudice.

SIGNED on the 17th day of July 1991.

/s/
Robert B. Maloney
U. S. District Judge

SECTION F

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

ALMA FAYE RUSSELL,

Plaintiff,

v. CA 3-90-1139-T

THE BOARD OF TRUSTEES OF
THE FIREMEN, POLICEMEN AND
FIRE ALARM OPERATORS PENSION
FUND OF DALLAS, TEXAS,

Defendant.

ORDER GRANTING CITY OF DALLAS' MOTION
FOR SUMMARY JUDGMENT

This case comes before the court on the July 25, 1990 Motion for Summary Judgment filed by Defendant City of Dallas. After considering the motion, response, and the applicable case and statutory authority, the court is of

the opinion that the motion should be granted and that the City of Dallas should be dismissed from this action.

Plaintiff commenced this action seeking to recover pension benefits which she contends are owed to her. Plaintiff alleges that the City of Dallas and the Board of Trustees have violated state and federal laws and the United States and Texas constitutions by making her continued receipt of survivor benefits contingent on her marital status.

The City contends that it is not a proper party to this action. Specifically, the City argues that it is a separate entity from the Board of Trustees and that the Board of Trustees has complete control over the pension plan in issue. As a result, the City contends there is no relief which it can afford Plaintiff. Plaintiff responds that the city and Board of Trustees are intertwined so that any liability on the part of the Trustees may be imputed to the City.

After reviewing the applicable authority in the subject, the court concludes that the Board of Trustees and the City are distinct entities, that the Board has sole responsibility for administering and disbursing funds from the pension plan, and that Plaintiff could be awarded no effective relief against the City should judgment be rendered in her favor. See Tex. Rev. Civ. Stat. Ann. art. 6243a-1; and Bolen v. Board of Firemen, Policemen and Fire Alarm Operators' Trustees of San Antonio, Texas, 308 S.W.2d 904 (Tex. Civ. App.--San Antonio 1957, writ ref'd). In light of this determination, the court concludes that the City of Dallas is not a proper party to this action.

It is therefore **ORDERED** that Defendant City of Dallas' July 25, 1990 Motion for Summary Judgment is granted, and that the City of Dallas is dismissed from this action with prejudice.

It is further **ORDERED** that this case is restyled as Alma Faye Russell v. The Board of Trustees of the Firemen, Policemen and Fire Alarm Operators Pension Fund of Dallas, Texas.

SIGNED on the 17th day of July 1991.

/s/
Robert B. Maloney
U. S. District Judge

SECTION G

AMENDMENT XIV--CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION H

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R. S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.1

SECTION I

Section 6.07 Survivor Benefits

(a) If a member of this Pension Plan dies, either while he is an active, contributing member of this plan, or after he has ceased to be an active member but is receiving, or is eligible to receive, benefits, his qualified survivors may make application for survivor benefits.

(b) Application for survivor benefits shall be subject to the following conditions:

(1) Written application for benefits must be filed with the administrator.

(2) The application will be considered at the meeting of the Board held during the month survivor benefits are to become effective, or as soon after the date the benefits become effective as possible. No benefits will be paid, however, until the board has approved the application.

(3) The Board may require the applicant to provide proof of eligibility, such as marriage licenses, birth certificates, adoption papers or sworn statements. The Board may withhold any survivor benefits until the eligibility of the applicant has been confirmed.

(c) Qualified survivors of members of this Plan who shall be eligible for survivor benefits shall include the following:

(1) The surviving spouse of the member, providing the marriage took place before the member ended his employment with either department, either voluntarily or involuntarily, and further provided

that the surviving spouse was legally married to the member at the time of the member's death.

(2) All surviving unmarried legitimate and legally adopted children under eighteen years of age, provided they were born or adopted before the member ended his employment with either department, either voluntarily or involuntarily. Children born after the member ends his employment with either department shall also be considered qualified survivors if the mother was pregnant before the member ended his employment with either department.

(3) The surviving natural parents of the member, provided the member is not survived by a spouse or children eligible for benefits, and further provided the surviving parents were wholly dependent upon the member for their support prior to the member's death.

(d) Survivor benefits shall be paid to all qualified survivors of members of this pension plan subject to the following conditions:

(1) The qualified surviving spouse of the member shall be eligible to receive benefits for the remainder of such survivor's life or until remarriage. Upon the remarriage of the surviving spouse, including common law marriage, the survivor benefits shall cease, effective the date following the marriage date.

(2) The Board shall have the right to stop survivor benefits being paid to any surviving spouse if it has reason to believe the surviving spouse has remarried.

The Board may withhold payment of benefits until such time as the surviving spouse furnishes proof that no marriage has taken place.

(3) Any surviving spouse whose benefits are being withheld may demand a hearing before the Board and present testimony to show why his benefits should be continued. Following such a hearing, the decision of the Board regarding benefits shall be final.

(4) The qualified surviving children of the member shall be eligible to receive benefits until they reach eighteen years of age, provided they do not marry or die. A surviving child shall be paid benefits through his eighteenth birthday, including the birthdate anniversary. If a surviving child marries or dies before his eighteenth birthday, the survivor benefits shall cease, effective the date following the marriage or death.

(5) All of the surviving children of a member shall share any survivor benefits due them, with each child receiving an equal pro-rata share of the total benefit. When any one child is no longer eligible for benefits, the pro-rata shares of the remaining children shall be increased, so that the total benefit paid the surviving child or children shall always be the maximum benefit possible.

(6) No survivor benefits paid to any surviving child may be used for any purpose other than to benefit the surviving child. The Board may withhold payment of benefits if it has reason to believe such benefits are not being properly administered.

(7) Any surviving child whose benefits are being withheld may demand a hearing before the Board and present testimony to show why his benefits should be continued. Following such a hearing, the decision of the Board regarding benefits shall be final.

(8) Survivor benefits paid to surviving children living with a surviving spouse shall be delivered to the spouse who shall be required to use the benefits in behalf of the children.

(9) Survivor benefits paid to surviving children living with some person other than the surviving spouse shall be delivered to the person with whom the children are living, provided the Board has designated such person as being a suitable person to receive and administer the benefits. The Board may, however, withhold payment of benefits to anyone but the legal guardian of the children, and may require proof that a person has been appointed legal guardian of the children before authorizing any benefits to be delivered to him.

(10) Nor survivor benefits shall be paid directly to any surviving child unless the Board determines that the child is mature enough and is capable of exercising the proper discretion in handling survivor benefits due him.

(11) The qualified surviving parents of the member shall eligible to receive benefits for the remainder of their lives.

(12) The Board may require all persons receiving survivor benefits, including surviving spouses, surviving children or their guardians, and surviving parents, to file with the administrator, at least once every two years, a sworn statement concerning their eligibility to continue to receive benefits. The Board may require such a sworn statement from any person receiving survivor benefits at any time. The Board may withhold survivor benefits from any person who fails or refuses to file such a statement when requested to do so.

(13) When the last qualified survivor of any member becomes ineligible to continue to receive survivor benefits, then that survivor shall be paid in a lump sum an amount equal to the difference, if any, between the total amount of all contributions made to this Pension Plan by the member prior to his retirement or death, and the sum of all benefits paid to the member and/or all of his qualified survivors. The total amount to be paid in benefits to the member and all survivors shall never be less than the total amount of contributions the member made to this Pension Plan.

SECTION J

Section 6.07 Survivor Benefits

(The following changes made herein shall apply to all current Plan B active members, retirees, and survivors; the effective date of the amendment is _____ ____, 1988 (the date that the Board certifies the election results)).

(a) and (b) NO CHANGES

(c) Qualified survivors of members of this Plan who shall be eligible for survivor benefits shall include the following:

(1) NO CHANGE

(2) All surviving unmarried legitimate and legally adopted children under ~~eighteen~~ nineteen (19) years of age, provided they were born or adopted before the member ended his employment with either department, either voluntarily or involuntarily. Children born after the member ends his employment with either department shall also be considered qualified survivors if the mother was pregnant before the member ended his employment with either department.

(3) NO CHANGE

(d) Survivor benefits shall be paid to all qualified survivors of members of this pension plan subject to the following conditions:

(1) The qualified surviving spouse of the member shall be eligible to receive benefits for the remainder of such survivor's life ~~or until remarriage. Upon the remarriage of the surviving spouse, including common law marriage, the survivor benefits shall cease, effective the date following the marriage date.~~

(2) ~~The Board shall have the right to stop survivor benefits being paid to any surviving spouse if it has reason to believe the surviving spouse has remarried. The Board may withhold payment of benefits until such time as the surviving spouse furnishes proof that no marriage has taken place.~~ RESERVED

(3) NO CHANGE

(4) The qualified surviving children of the member shall be eligible to receive benefits until they reach ~~eighteen~~ nineteen (19) years of age, provided they do not marry or die. A surviving child shall be paid benefits through his ~~eighteenth~~ nineteenth (19th) birthday, including the birthdate anniversary. If a surviving child marries or dies before his ~~eighteenth~~ nineteenth (19th) birthday, the survivor benefits shall cease effective the date following the marriage or death. However, disabled child(ren) shall not be removed from participation in the division of such pension benefits upon reaching the age of ~~eighteen (18)~~ nineteen (19) years where the disability originated before reaching are twenty-three (23) if the Board finds:

(a) through (e) NO CHANGES

A finding relating to this type of disability is subject to review and change by the Board as in all other cases.

(5) through (13) NO CHANGES

SECTION K

Section 6.07 Survivor Benefits

(a) If a member of this Pension Plan dies, either while he is an active, contributing member of this plan, or after he has ceased to be an active member but is receiving, or is eligible to receive benefits, his qualified survivors may make application for survivor benefits. The qualified surviving spouse of a member identified in Section 5.03 (c) or the guardian of qualified surviving children of a member identified in Section 5.03 (c), if no surviving spouse exist, shall have the option to select the pension plan from which survivor benefits are received, provided that the deceased vested or active member has contributed to the plan selected. Provided further that a survivor who elects to receive benefits under the Old Plan or Plan A shall be entitled to be reimbursed from the pension fund the difference between the member's contributions to Plan B and the contributions that would have been made during the same period to the plan from which the survivor elects to receive benefits. A survivor desiring a refund of such excess contributions must make application for the refund with the Administrator within three years of the date she/he makes application for survivor benefits. In no event shall the option contained in this subsector be available to survivors of a retiree who had, at the time of his death, already applied for retirement benefits from the Fund and selected a plan under which to retire as provided in Section 5.03 (c).

(b) Application for survivor benefits shall be subject to the following conditions:

(1) Written application for benefits must be filed with the administrator.

(2) The application will be considered at the meeting of the Board held during the month survivor benefits are to become effective, or as soon after the date the benefits become effective as possible. No benefits will be paid, however, until the Board has approved the application.

(3) The Board may require the applicant to provide proof of eligibility, such as marriage licenses, birth certificates, adoption papers or sworn statements. The board may withhold any survivor benefits until the eligibility of the applicant has been confirmed.

(c) Qualified survivors of members of this Plan who shall be eligible for survivor benefits shall include the following:

(1) The surviving spouse of the member, providing the marriage took place before the member ended his employment with either department, either voluntarily or involuntarily, and further provided that the surviving spouse was legally married to the member at the time of the member's death.

(2) All surviving unmarried legitimate and legally adopted children under nineteen (19) years of age, provided they were born or adopted before the member ended his employment with either department, either voluntarily or involuntarily. Children born after the member ends his employment with either department shall also be considered qualified survivors if the mother was pregnant before the member ended his employment with either department.

(3) The surviving natural parents of the member, provided the member is not survived by a spouse or children eligible for benefits, and further provided the surviving parents were wholly dependent upon the member for their support prior to the member's death.

(d) Survivor benefits shall be paid to all qualified survivors of members of this pension plan subject to the following conditions:

(1) The qualified surviving spouse of the member shall be eligible to receive benefits for the remainder of such survivor's life.

(2) RESERVED

(3) Any surviving spouse whose benefits are being withheld may demand a hearing before the Board and present testimony to show why his benefits should be continued. Following such a hearing, the decision of the board regarding benefits shall be final.

(4) The qualified surviving children of the member shall be eligible to receive benefits until they reach nineteen (19) years of age, provided they do not marry or die. A surviving child shall be paid benefits through his nineteenth (19th) birthday, including the birthdate anniversary. If a surviving child marries or dies before his nineteenth (19th) birthday, the survivor benefits shall cease effective the date following the marriage or death. However, disabled child(ren) shall

not be removed from participation in the division of such pension benefits upon reaching the age of nineteen (19) years where the disability originated before reaching age twenty-three (23) if the Board finds:

(a) Such child(ren) are so physically or mentally handicapped, either congenitally or through injury suffered or disease contracted, as to be unable to support themselves or to secure and hold any gainful employment or pursue an occupation; and

(b) Such child(ren) are not married; and,

(c) Such disability was not the result of an occupational injury for which the child(ren) receive compensation equal or greater than that provided under this Section and if the child(ren) received less than the amount provided under this Section the Fund shall pay the difference; and,

(d) Such disability was not self-inflicted; and,

(e) Such disability did not occur while committing a felony.

A finding relating to this type of disability is subject to review and change by the Board as in all other cases.

(5) All of the surviving children of a member shall share any survivor benefits due them, with each child receiving an equal pro-rata share of the total benefit. When any one child is no longer eligible for benefits, the pro-rata shares of the remaining children shall be increased, so that the total benefit paid the surviving child or children shall always be the maximum benefit possible.

(6) No survivor benefits paid to any surviving child may be used for any purpose other than to benefit the surviving child. The Board may withhold payment of benefits if it has reason to believe such benefits are not being properly administered.

(7) Any surviving child who benefits are being withheld may demand a hearing before the Board and present testimony to show why his benefits should be continued. Following such a hearing, the decision of the Board regarding benefits shall be final.

(8) Survivor benefits paid to surviving children living with a surviving spouse shall be delivered to the spouse who shall be required to use the benefits in behalf of the children.

(9) Survivor benefits paid to surviving children living with some person other than the surviving spouse shall be delivered to the person with whom the children are living, provided the Board has designated such person as being a suitable person to receive and administer the benefits. The Board may, however, withhold payment of benefits to anyone but the legal guardian of the children, and

may require proof that a person has been appointed legal guardian of the children before authorizing any benefits to be delivered to him.

(10) No survivor benefits shall be paid directly to any surviving child unless the Board determines that the child is mature enough and is capable of exercising the proper discretion in handling survivor benefits due him.

(11) The qualified surviving parents of the member shall be eligible to receive benefits for the remainder of their lives.

(12) The Board may require all persons receiving survivor benefits, including surviving spouses, surviving children or their guardians, and surviving parents, to file with the administrator, at least once every two years, a sworn statement concerning their eligibility to continue to receive benefits. The Board may require such a sworn statement from any person receiving survivor benefits at any time. The Board may withhold survivor benefits from any person who fails or refuses to file such a statement when requested to do so.

(13) When the last qualified survivor of any member becomes ineligible to continue to receive survivor benefits, then that survivor shall be paid in a lump sum an amount equal to the difference, if any, between the total amount of all contributions made to this Pension Plan by the member prior to his retirement or death, and the sum of all benefits paid to the member and/or all of his qualified survivors. The total amount to be paid in benefits to

the member and all survivors shall never be less than the total amount of contributions the member made to this Pension Plan.

3)

Supreme Court, U.S.
FILED
JAN 28 1993
OFFICE OF THE CLERK

No. 92-998

In The

Supreme Court of the United States

October Term, 1992

ALMA FAYE RUSSELL,

Petitioner,

v.

CITY OF DALLAS AND THE BOARD OF TRUSTEES OF THE FIREMEN, POLICEMEN AND FIRE ALARM OPERATORS' PENSION FUND OF DALLAS, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

GARY B. LAWSON
Counsel of Record
JOHN A. KOEPKE
Of Counsel
HARVEY G. JOSEPH
Of Counsel
GODWIN & CARLTON, P.C.
901 Main Street
Suite 3300
Dallas, Texas 75202-3714
(214) 939-4400

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

36 pp

QUESTIONS PRESENTED

(1) Whether the Circuit Court properly found Petitioner's Causes of Action to be barred by the applicable statute of limitations of the State of Texas.

(2) Whether the Circuit Court applied the proper standard of review for a Summary Judgment.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Board of Trustees of the Firemen, Policemen and Fire Alarm Operators' Pension Fund of Dallas, Texas ("Respondent"), respectfully submits its Brief in Opposition to Alma Faye Russell's request that a Petition for Writ of Certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit. Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

Respondent, the Board of Trustees of the Firemen, Policemen and Fire Alarm Operators' Pension Fund of Dallas, Texas ("Respondent" hereinafter), disputes Alma Faye Russell's ("Petitioner" hereinafter) assertion and intentional mischaracterization of fact in her Petition for Writ of Certiorari that Respondent temporarily "withheld" her survivor benefits and that it was only after an evidentiary hearing pursuant to Section 6.07(d)(3) of Plan B that Respondent finally decided to deny her benefits. The true facts are that Petitioner's benefits completely and permanently ceased, pursuant to the express provisions of Plan B, upon her remarriage in 1986. Petitioner never complained or questioned the propriety of this event at that time.

When the wording of Section 6.07 before its amendment in 1988 is reviewed, it is clear that Petitioner's benefits had not been temporarily "withheld" but quite clearly terminated. Section 6.07 specifically uses the word

"withheld" only in the following contexts. (Pet. Appx. p. 33).

Section 6.07(b)(3) provides that Respondent may "withhold" survivor benefits until the eligibility of the applicant has been confirmed. In other words, survivor benefits would not commence *for the first time* until Respondent is satisfied that a person would be entitled to them. In that situation, a potential beneficiary would be entitled to a hearing as to why his or her benefits had not yet commenced. Section 6.07(d)(2) states that Respondent may withhold payment of benefits if Respondent believes that a surviving spouse is remarried *until such time as the surviving spouse furnishes proof that no marriage has taken place.* If it is proved no marriage ever took place, benefits resume.

Section 6.07(d)(6) states that no survivor benefits paid to a surviving child may be used for any other purpose than to benefit the surviving child and if Respondent believes that the benefits are not being properly administered for the benefit of the surviving child then Respondent may temporarily "withhold" payment of benefits until it is proved otherwise. Section 6.07(d)(9) states that Respondent may "withhold" payment of benefits if survivor benefits are being paid to surviving children living with some person other than the surviving spouse and Respondent believes that that person is not the legal guardian of the child. Then benefits may be temporarily "withheld" until legal guardianship is proved. Section 6.07(d)(12) states that Respondent may "withhold" survivor benefits from a party receiving such benefits if Respondent believes that they are no longer eligible to receive benefits *until such time* as the person

files a sworn statement reaffirming their eligibility to benefits.

These are the only provisions in Section 6.07 in which benefits may be temporarily "withheld." Petitioner's benefits were not temporarily withheld but permanently ceased under the express provisions of Section 6.07(d)(1) before it was amended in 1988. Indeed, prior to the 1988 amendment, Section 6.07(d)(1) specifically stated that benefits shall *cease* upon remarriage. (Pet. Appx. p. 33). With respect to the consequences of a spouse's remarriage, the Plan does not use the word "withheld" as it does in other sections of the Plan but specifically uses the word "ceased." When benefits *cease* as opposed to being *withheld*, the Plan does not provide for an evidentiary hearing.

The 1988 amendments left unaltered the use of the words "withheld" and "ceased." In the interest of brevity, Respondent will not recite at length those amended sections, but suffice to say that a clear reading of Section 6.07 shows that Petitioner's benefits were not temporarily "withheld," but permanently *ceased*, and that, therefore, no Section 6.07(d)(3) hearing was given.

Indeed, Petitioner herself acknowledged that her benefits were not temporarily withheld but permanently ceased in her own letter written in 1986 to Respondent where she stated that "I'm planning to get married April 26, 1986. I want to let you know in advance so you can make the *final check* correct and won't have to be returned, etc." (Pet. Appx. p. 10) (emphasis added).

Respondent does not contest the fact that Respondent, more than *three years* after her benefits ceased, as a matter of courtesy, allowed Petitioner to appear before it

and state why she felt entitled to reinstatement of benefits. But Respondent vehemently denies that this was done pursuant to Section 6.07(d)(3) of Plan B.

Respondent also contests the statement in Page 4 of Petitioner's Brief that summary judgment was granted before discovery had been fully completed in the trial court. Both Petitioner and Respondent conducted extensive discovery in this case and all discovery that was requested or sought was completed before summary judgment was granted. Furthermore, Petitioner never moved for a continuance or submitted a Rule 56 affidavit showing how more discovery would assist her in opposing the motion for summary judgment. Consequently, she has no complaint. *Netto v. Amtrak*, 863 F.2d 1210, 1215 (5th Cir. 1989); *Fontenot v. Upjohn*, 780 F.2d 1190, 1194 (5th Cir. 1986).

Lastly, although more properly deemed a legal argument, Petitioner has put in her statement of the case that the Fifth Circuit considered some but not all of the extrinsic evidence in affirming the summary judgment. First, Respondent would state that the "extrinsic evidence" complained of by Petitioner is a copy of the ballot sent to the members of the Pension Fund in order for them to vote on the proposed amendments to the Pension Fund. This ballot was attached to Respondent's Motion for Summary Judgment as an Exhibit. (R III, 1). As to the other "extrinsic evidence" that Petitioner states should also have been considered, *none of this evidence was in the record*!

SUMMARY OF ARGUMENT

Certiorari should be denied in this case because the Fifth Circuit's opinion does not conflict with *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). It also does not conflict with *Dixon v. Anderson*, 928 F.2d 212 (6th Cir. 1991) and *Greene v. Los Angeles City Superintendent of Schools*, 883 F.2d 1472 (9th Cir. 1989).

It is irrelevant whether the Fifth Circuit's opinion conflicts with the Sixth or the Ninth Circuit because the issue raised here is not an issue of unsettled law, but one where this Court has spoken clearly in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). The Fifth Circuit accurately summarized the test in *Lorance* to determine limitations which is whether the original allegedly discriminatory act has the degree of permanence that should trigger the claimant's awareness of and duty to assert his or her rights. *See Lorance*, 490 U.S. at 906. Under the test in *Lorance*, Petitioner could not successfully assert a continuing tort because there was only one allegedly discriminatory act (i.e. the clear and permanent cessation of her benefits upon remarriage).

The holding in *Lorance* was that a facially neutral act that results in discrimination is not subject to the "continuing violations" theory and the statute of limitations thus begins to run from the date the act occurs or the statute is enacted. Conversely, a facially discriminatory act or statute may be subject to a "continuing violations" theory in which case the statute of limitations begins to run on the date that the consequences of the discriminatory act occurs or the statute is enacted. *See Lorance*, 490 U.S. at 906. In either event, *Lorance* cannot support Petitioner's claim that limitations has not here run. Even,

assuming *arguendo*, the Section 6.07(d), prior to the 1988 amendment, was facially discriminatory, limitations would still have run against Petitioner. This is because limitations would have commenced upon the date the Petitioner was, if at all, harmed by Section 6.07(d) which would be on April 10, 1986, when her benefits ceased upon remarriage. Therefore, under *Lorance*, the Fifth Circuit properly determined that limitations had run.

As the Fifth Circuit put quite accurately in its opinion, the issue is whether "the original discriminatory act had the degree of permanence that should trigger the claimant's awareness of and duty to assert her rights." *Russell v. City of Dallas*, 968 F.2d 489, 493 (5th Cir. 1992). Certainly, having one's benefits terminated upon remarriage and that termination becoming permanent would certainly be a degree of permanence and awareness which should trigger the claimant's awareness of and duty to assert her rights. This is especially true in this case where Petitioner was well aware of the provisions of Plan B many years before her husband retired and later became deceased and had herself authored a letter in 1986 acknowledging the consequences of her remarriage.

The Fifth Circuit's affirmance of Respondent's summary judgment against Petitioner does not conflict with its decision in *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983). Furthermore, even if the Fifth Circuit misapplied its own law, this would not be grounds for certiorari.

It is well established that it is not proper grounds to grant a Writ of Certiorari on the argument that the lower court has misapplied its own circuit's law. *Wisniewski v. United States*, 77 S.Ct. 633, 634 (1957). In addition, the

Fifth Circuit's decision does not violate its standard for "continuing violations" discussed in *Berry*. As the Fifth Circuit aptly observed in *Berry*, the important issue is whether the act complained of would have the degree of permanence which should trigger a party's awareness of and duty to assert his or her rights. *Berry*, 715 F.2d at 981. There is no doubt that Petitioner's benefits permanently ceased in 1986 and thus Petitioner must have complained of that action within two or four years of that date.

The affirmance of summary judgment on state statute of limitations endangers no national policies requiring remedy by Writ of Certiorari. Furthermore, the lower court's correctly ruled the claims barred by limitations.

The lower court's rulings can and should be upheld on a myriad of grounds. Any claim that Petitioner had as to the pre-1988 version of Plan B would clearly be barred by limitations because such would have arisen more than four years before the date of her lawsuit. As to Petitioner's claim that she is entitled to receive benefits under the 1988 amendment to Plan B, this would only be valid if the amendment were to be applied retroactively. The 1988 amendment cannot be applied retroactively for two reasons. First, the plan members specifically voted to not make it retroactive. Second, even if the plan members had not specifically stated the amendment was not retroactive, a statute in Texas is presumed to be prospective only unless it is expressly made retroactive. *See* Tex. Govt. Code. Ann. § 311.022 (Vernon 1988).

Likewise, Petitioner's claim that limitations was "tolled by a Section 6.07(d)(3) hearing" is also without merit. As explained fully in this brief, since her benefits were not temporarily *withheld* as defined by the Plan

itself, a Section 6.07 hearing could not have been held. Also, Petitioner's argument is rebutted by the theories and holdings of *Lorance, supra*, and *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

Respondent notes that many state and lower federal courts have addressed the issue of whether benefits such as these are to be applied retroactively, whether limitations begins to run from the date benefits cease, and whether plans of this type are unconstitutional under either the state or federal constitutions. Petitioner cannot cite one case holding such in her favor, but Respondents cite later in this brief the multitude of cases that hold not only that limitations had run, but that Petitioner had no valid cause of action.

Lastly, Certiorari should be denied because the circuit court's holding does not expand the standard for summary judgment, but scrupulously follows the standard set by this Court in *Celotex v. Catrett*, 477 U.S. 317 (1986).

The only basis that Petitioner states for her claim that the standards in *Celotex* were not adhered to is her claim that the Fifth Circuit improperly relied upon the ballot to amend Plan B as part of its basis for affirming summary judgment. It is Petitioner's claim that the ballot was "extrinsic evidence." However, the ballot was not, as argued by the Petitioner, extrinsic evidence, because the ballot was attached to the Motion for Summary Judgment. This ballot was not challenged in Petitioner's Response to the Motion for Summary Judgment as required by the clear language of Fed. R. Civ. P. 56(e) as well as *Celotex*. Equally important, applicable state law requires that in deciding what a statutory intent is, the

"entire act" must be considered which means "the caption, the body of the act, and the emergency clause." *Brown v. Owens*, 674 S.W.2d 748, 750 (Tex. 1984).

REASONS FOR DENYING THE WRIT

No Conflict Between The Circuits or With This Court

1. **The Fifth Circuit affirmed Respondent's Summary Judgment because Petitioner's action was barred by the statute of limitations. This neither conflicts with *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) nor does it conflict with the holdings of the Ninth Circuit and the Sixth Circuit.**

All parties approaching this Court must respectfully recognize that the primary purpose for which this Court exercises its certiorari jurisdiction is to resolve major conflicts between the Circuit Courts of Appeals concerning the meaning or provisions of federal law. *Braxton v. United States*, 111 S.Ct. 1854, 1857 (1991). With over 5,000 petitions a year for certiorari filed with this Court, Petitioner must recognize the Supreme Court only has the time and resources to determine 120 to 140 of these cases. Certiorari should not be granted except in cases involving issues of *utmost importance to the national public*, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinions between the various Circuit Courts of Appeals. *Rice v. Sioux City Memorial Park Cemetery*, 75 S.Ct. 614, 620 (1955).

Continuing Torts

It is Petitioner's claim that the Fifth Circuit's decision is in conflict with *Dixon v. Anderson*, 928 F.2d 212 (6th Cir. 1991) and *Greene v. Los Angeles City Superintendent of Schools*, 883 F.2d 1472 (9th Cir. 1989) in its interpretation of the doctrine of "continuing torts" for purposes of tolling the statute of limitations. Petitioner also claims that the Fifth Circuit decision conflicts with this Court's opinion in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). It is irrelevant whether the Fifth Circuit's opinion conflicts with the Sixth or the Ninth Circuit because this is not an issue of unsettled law but an issue where this Court has spoken clearly in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). Therefore, the important question is whether the Fifth Circuit's opinion conflicts with *Lorance* and not whether it conflicts with the Sixth and the Ninth Circuit. Once this Court has spoken on the issue, then the applicable question is whether there is a "real and embarrassing conflict" between the Fifth Circuit's decision and a decision from this Court. *See* generally *Braxton v. United States*, 111 S.Ct. at 1157.

There is no conflict between the Fifth Circuit decision in this case and *Lorance*. Indeed, on page 10 of the Fifth Circuit's opinion the Court acknowledges that the test to be applied in determining whether there is a continuing tort or continuing violation which would suspend the statute of limitations is the test enunciated by this Court in *Lorance*. The underlying rationale for any such tolling or suspending limitations is whether the claimant was aware or should have been aware that he or she had a claim.

If such awareness is obvious, then there is no rational reason for suspending the statute of limitations. The purposes of a statute of limitations are laudatory and a primary purpose is to eliminate stale claims where memories may fail and the evidence may be misplaced, lost or otherwise not now available because the claimant waited so long to pursue his or her claim. *See Delaware State College v. Ricks*, 449 U.S. 250, 260 (1980). Under the test in *Lorance*, Petitioner could not successfully assert a continuing tort because there is only one allegedly discriminatory act (i.e. the clear and permanent cessation of her benefits upon remarriage).

Petitioner claims that a cessation of survivor benefits upon remarriage unlawfully restricts the right to marry and is therefore unconstitutional. But, setting aside for the moment the merits of that argument, the issue of whether or not Petitioner was aware that her survivor benefits would terminate upon remarriage and in fact did terminate upon remarriage is beyond dispute. This is evidenced by her letter to Respondent acknowledging both the cessation of her survivor benefits and in doing so her understanding of the clear language of Plan B, which terminated her right to benefits upon remarriage. (Pet. Appx. p. 33). It is not disputed that the statute of limitations for her Constitutional and tort claims are two years. As this claim arose, if at all, at the latest in April of 1986, the date Petitioner's survivor benefits ceased upon remarriage, then it is obvious that limitations ran long before Petitioner filed suit in May 1990.

The *Lorance* Case

An examination of the *Lorance* case clearly establishes that the Fifth Circuit's opinion is not in conflict with *Lorance* and affords no basis for granting a Writ of Certiorari. In *Lorance*, this Court addressed the issue of when the statute of limitations ran in a Title VII action. The *Lorance* case involved a facially neutral seniority system whose application in fact caused sex discrimination in promotion and hiring. The issue in *Lorance* was whether limitations began to run from the date the seniority system was amended or from the date that Plaintiff was tangibly harmed by not being promoted under the old system. This Court held that limitations began to run when the discriminatory act occurred, which was with the amendment to the seniority system and *not* when the effects of that action were felt, (i.e., when the Plaintiff was not promoted).

This Court rejected any argument that a "continuing violations" theory would toll limitations under the theory that the alleged wrongdoing took place when the result of that discriminatory act was felt. Rather, this Court held that the proper focus is upon the time of the discriminatory act and not upon the time which the consequences of the act becomes most painful. *Lorance*, 109 S.Ct. at 2266, 490 U.S. at 906. Petitioner's argument was rejected in the *Lorance* case, as well as in this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980) and *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977). The holding in *Lorance* is that a facially neutral act that results in discrimination is not subject to the "continuing violations" theory and the statute of limitations thus begins to run from the date the act occurs or the statute is enacted.

Conversely, a facially discriminatory act or statute may be subject to a "continuing violations" theory in which case the statute of limitations begins to run on the date that the consequences of the discriminatory act occur or the statute is enacted. *See Lorance*, 490 U.S. at 906.

In either event, *Lorance* cannot support Petitioner's premise. Even, assuming *arguendo*, that Section 6.07(d), prior to the 1988 amendment, was facially discriminatory, limitations would still have run against Petitioner. This is so because if Section 6.07(d) is facially neutral, then limitations would have run from the date Plan B first included language causing benefits to cease upon remarriage. This would have been in the year 1973, many years before the suit was filed. On the other hand, if it is assumed, *arguendo*, that Section 6.07(d) is facially discriminatory, then limitations would have commenced upon the date that Petitioner was harmed by Section 6.07(d), which would be on April 10, 1986, when her benefits ceased upon remarriage. However, even under this scenario, limitations has still run. It provides no comfort for Petitioner to argue that under *Lorance* a "continuing violations" occurred when, regardless, her claim would still be barred by limitations. The only difference is if Section 6.07(d) was considered facially neutral then limitations expired long before 1988, while if Section 6.07(d) is considered to be facially discriminatory then limitations began to run in 1986. Therefore, under *Lorance*, the Fifth Circuit properly determined that limitations had run.

As the Fifth Circuit quite accurately noted in its opinion the issue was whether "the original discriminatory act had the degree of permanence that should trigger the claimant's awareness of and duty to assert her

rights." *Russell*, 968 F.2d at 493. Certainly, cessation of benefits upon remarriage, which is permanent, would certainly be a degree of permanence and awareness that should trigger the claimant's awareness of and duty to assert her rights. This is especially true in this case where Petitioner was well aware of the provisions of Plan B many, many years before her husband retired and later became deceased.

Although discussed in more detail later in this Brief, it is clear from this Court's own holdings that even if limitations had not run, summary judgment would have been proper because Petitioner's claim that Plan B violated due process or equal protection is without merit. The Fifth Circuit is not required to rest its affirmance of the trial court on the grounds adopted by the trial court but instead may affirm the judgment on any alternative and proper legal grounds. *Degan v. Ford Motor Company*, 869 F.2d 889, 992 (5th Cir. 1989).

2. **The Fifth Circuit's affirmance of Respondent's summary judgment against Petitioner does not conflict with its decision in *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983). Furthermore, even if a circuit court misapplied its own law, this would not be grounds for certiorari.**

It is Petitioner's contention that the Fifth Circuit's decision also misapplied the Fifth Circuit's own standard for determining continuing violations as established in *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986). First, it is not proper grounds to grant a Writ of Certiorari on the argument

that the lower court has misapplied its own circuit's law. *See Wisniewski v. United States*, 77 S.Ct. 633, 634 (1957). In any event, the Fifth Circuit's decision here does not violate its standard for "continuing violations" discussed in *Berry*.

In *Berry*, the plaintiff complained of sex discrimination in that she was given more work as a professor than her male colleagues for the same amount of pay and that the work structure was designed to force her out of her position. The plaintiff had filed suit sometime after she was notified that she would not be rehired by the defendant university. The plaintiff had alleged a "continuing violation" of Title VII which would preclude the statute of limitations from running on her claim. The Fifth Circuit found no merit in this claim. The Fifth Circuit stated that a "continuing violations" theory will not stand "to resurrect claims about discrimination concluded in the past, even though its effects persist." *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980).

Likewise, Petitioner only alleges one concrete act of "discrimination." The act occurred when her benefits ceased upon remarriage in 1986. As the Fifth Circuit aptly observed in *Berry*, the important issue is whether the act complained of would have the degree of permanence which should trigger a party's awareness of and duty to assert his or her rights. *Berry*, 715 F.2d at 981. There is no doubt that Petitioner's benefits permanently ceased in 1986 and thus Petitioner must have complained of that action within two or four years of that date.

The court in *Berry* also held that an act of discrimination that results in termination cannot, per se, constitute a

continuing violation that would extend the time for filing a complaint because it was a discrete act of discrimination of which the plaintiff was obligated to seek relief within the applicable period of limitations. *See Delaware State College*, 449 U.S. at 257. Likewise, when Petitioner's benefits ceased in April 1986 that would be the latest possible date from which limitations would run.

Petitioner's claim that Respondent's amendment of the Plan in 1988 gives rise to a new and independent cause of action also fails. Under the applicable two year statute of limitations, Petitioner would still be barred and Petitioner had no standing to assert those claims because as the trial court aptly held:

> Petitioner would have no standing to raise any claim that would arise after her termination of benefits because she is no longer a member of the Plan.

See Dallas Gay Alliance v. Dallas County Hospital District, 719 F.Supp. 1380, 1383-86 (N.D. Tex. 1989); *Harvey v. Casebeer*, 531 S.W.2d 206, 208 (Tex. Civ. App. Tyler 1975, no writ).

3. The affirmance of a summary judgment on state statute of limitations grounds endangers no national policies requiring remedy by Writ of Certiorari. Furthermore, the lower courts correctly ruled the claims were barred by limitations.

No Cause of Action

Petitioner cites the case of *Joseph v. New Orleans Electric Pension*, 754 F.2d 628 (5th Cir. 1985), *cert. denied*, 474

U.S. 106 (1985) for the proposition that she was entitled to raise her post-1986 claims. A close examination of *Joseph*, as well as Petitioner's own analysis of the *Joseph* case, actually supports the trial court's holding. In *Joseph*, a group of retirees accepted lump sum retirement benefits in lieu of a continuing monthly benefit that might have yielded a smaller sum. More than seven months after this election, the Trustees amended the pension plan to increase the benefits but made the amendment retroactive for only the prior seven months. A group of retirees who retired longer than seven months prior filed suit. These retirees were found not to have standing to raise a claim because they had retired more than seven months prior to the amendment, had accepted all the benefits due them under the plan as it then existed, and therefore had no reasonable expectation of benefits.

Likewise, Petitioner has no basis to raise any post-1986 claims. When Plan B was amended in 1988, Petitioner was no longer entitled to benefits under Plan B, she had accepted all the benefits due her under Plan B, as in effect prior to 1988, and had no reasonable expectation of future benefits.

The only possible way for Petitioner to receive any benefits under the 1988 amendment would be if the amendment applied retroactively. The 1988 amendment cannot be applied retroactively for two reasons. The first reason is that when Plan B was amended, the members of the Plan explicitly voted to make the amendment effective from April 21, 1988 forward. Equally important, and a fact which Petitioner chooses to ignore, is that even if the ballot failed to state it was not retroactive, the amendment would not be applied retroactively. That is because

in Texas a statute is presumed to be prospective in its application only, unless it is *expressly made retroactive*. *See Ex Parte Abell*, 613 S.W.2d 255, 258 (Tex. 1981); Tex. Govt. Code Ann. § 311.022 (Vernon 1988).

Limitations Not Tolled By Hearing

Petitioner also argues that the statute of limitations did not run on her cause of action because she claims she was given a Section 6.07(d)(3) hearing and, until the results of that hearing became final in 1989, limitations did not begin to run. As explained earlier in this Brief, since her benefits were not temporarily *withheld* as defined by the Plan itself, a Section 6.07 hearing could not have been held. Second, and equally important, is that this argument is rebutted by the theories and holdings of *Lorance, supra* and *Delaware State College, supra*.

If the Court were to adopt Petitioner's argument, that limitations does not begin to run until the time she issues a complaint to Respondent, then the running of the statute of limitations would be solely under the control of the potential plaintiff. This action could be commenced three years, thirty years, or even three hundred years from the date of the purported discriminatory action and, thus it would never be barred by limitations. This runs totally contrary to the holdings in the above-mentioned cases as well as the general and accepted theory that statute of limitations are desirable procedural mechanisms to prohibit the prosection of stale claims. *See Delaware State College*, 449 U.S. at 260.

Petitioner's recitation of her alleged request for a Section 6.07(d)(3) hearing is not altogether correct. What

actually occurred was that on February 13, 1988, Petitioner wrote Respondent stating that she was getting a divorce and wanted her survivor's benefits reinstated (R VI, 277). On March 15, 1988, Respondent wrote Petitioner back stating that the Plan language contained no provision to reinstate benefits if the marriage results in a divorce, so there would be no reinstatement of her survivor's benefits (R VI, 278).

In August of 1988, Petitioner's attorney wrote a letter to the City Attorney's office demanding that Petitioner's survivor benefits be reinstated or that she would file a lawsuit (R III, 149). No reinstatement occurred. In February of 1989, Petitioner's attorney wrote yet another letter stating that she represented Petitioner and requested a hearing before Respondent to present her reasons why she was entitled to reinstatement of her survivor benefits. (R III, 154). Respondent wrote in February of 1989 agreeing as a courtesy to allow Petitioner to speak (R VII, 142).

In March of 1989, Respondent wrote Petitioner's attorney stating that Respondent would consider Petitioner's request. On May 15, 1989, Respondent wrote Petitioner stating that the clear language of Section 6.07 dictated that Petitioner was not entitled to any reinstatement of benefits (R III, 163).

It is inconceivable that upon review of these facts, any action taken by Respondent could raise a reasonable inference giving Petitioner the expectation that Respondent would grant her request for reinstatement. Indeed, Respondent stated on several occasions there would be no reinstatement. Respondent did agree, as a courtesy to her, to allow Petitioner to speak to Respondent at one of

its meetings and state her position. Respondent never stated implicitly or explicitly that it would reinstate her survivor benefits.

None of Respondent's actions subsequent to the date Petitioner's benefits ceased could "toll" the statute of limitations, because the rule of law is that the "reconsideration" of an allegedly "discriminatory decision" does not toll the accrual of a cause of action past the initial date of the discriminatory decision. *Griffin v. Big Spring Independent School District*, 706 F.2d 645, 649 (5th Cir. 1983), *cert. denied*, 464 U.S. 1008 (1983); nor does pursuing administrative remedies "toll" the statute of limitations. *Delaware State College*, 449 U.S. at 256-261.

No National Policies Affected

The Fifth Circuit's affirmance of the trial court's granting summary judgment based upon, *inter alia*, the statute of limitations, endangers no national policies protecting individual rights nor does it infringe upon the right to marry. As explained above, under *Lorance* whether the Plan was facially neutral or facially discriminatory, the statute of limitations would have run long before Petitioner filed suit.

In addition, Writ of Certiorari should not be granted in this case because any complaint that Petitioner may have as to the discriminatory effect of cessation of benefits upon her "right to marry" has been waived. This is because this issue was not raised in her brief to the Fifth Circuit and has therefore been waived. *See Rogers v. Lodge*, 102 S.Ct. 3272, 3281 (1982); *Price v. Digital Equipment Corp.*, 846 F.2d 1026, 1028 (5th Cir. 1988). As this Court

has stated, a contention not raised in the Court of Appeals will not be considered by this Court. *Rogers*, 102 S.Ct. at 3281.

Right to Marry

Even, assuming *arguendo*, that this point was validly raised in this Court, Petitioner's complaint that Section 6.07(d) of Plan B, as in effect prior to 1988, violated her constitutional right to remarry has been foreclosed by this Court in *Califano v. Boles*, 443 U.S. 282 (1979) and *Califano v. Jobst*, 434 U.S. 47 (1977).

To illustrate this point, Respondent will just briefly discuss the facts and holdings of these two cases. In *Jobst*, this Court held that a provision in the Social Security Act terminating a disabled dependent child's benefits upon remarriage was constitutional. The Court found it rational to assume that a married person is less likely to be dependent upon his or her parents for support than an unmarried child. This Court reasoned further that an act does not render it invalid simply because some persons who might otherwise get married were deterred by the Act or because some who did not marry were burdened by the Act. This Court concluded that the rule terminating the benefits payable to a secondary beneficiary (like Petitioner) upon marriage was unquestionably valid.

It is rational to assume that widows and widowers who remarry are less likely to be dependent upon survivor's benefits than those who do not. Like *Jobst*, the provision challenged is part of a complex plan designed to administer trust funds financed by the primary beneficiary to the funds, the employee. Like *Jobst*, the

entitlement of any secondary beneficiary is solely predicated on his or her relationship to the primary beneficiary. In examining the facts and holdings of *Jobst*, it could only be concluded that upon examining the merits of Petitioner's claim, her claim must fail.

Likewise, in *Boles*, the benefits in question were "mother's insurance benefits" provided under the Social Security Act to widows and divorced wives of deceased wage earners and not provided to women who had never married the wage earner who fathered her child. This Court again held this distinction to be constitutional.[1] Again, the concern of the Respondent in administering the fund with its limited resources to provide benefits to its police officer and fire fighter members, as well as their eligible survivors who need help the most, is certainly rational. To conclude that a widow or widower who remarries is going to be less dependent on survivor's benefits than one who does not remarry and for whom the survivor's benefits are the only source of sustenance is not only rational but basic common sense.

Retroactivity and Constitutionality

Respondent notes that many state and lower federal courts have addressed the issue of whether benefits such

---

[1] *Boles* held:

> General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases.

Citing *Jobst* at 434 U.S. at 53.

as these are to be applied retroactively, whether limitations begin to run from the date benefits cease, and whether plans of this type are unconstitutional under either the state or federal constitutions. Petitioner cannot cite one case holding such in her favor, but Respondents will cite the multitude of cases that hold not only procedurally that limitations have run, but also that Petitioner has no valid cause of action. These cases are: *Atkinson v. Retirement Board of Police Retirement System of Kansas City*, 343 S.W.2d 25 (Mo. 1960); *Minor v. Stafford*, 157 N.E. 164 (Ill. 1927); *Burgess v. City of Detroit*, 102 N.W.2d 483 (Mich. 1960); *Young v. O'Keefe*, 82 N.W.2d 111 (Iowa 1957); *Kerr v. Murphy*, 484 S.W.2d 684 (Ark. 1972); *McCarrey v. Utah State Teachers Retirement Board*, 177 P.2d 725 (Utah 1947); *In re Ross*, 207 P.2d 254 (Okla. 1949); *Linaka v. Firemen's Pension Fund of Philadelphia*, 31 A.2d 122 (Pa. 1943); *Pitts v. City of Richmond*, 366 S.E.2d 56 (Va. 1988); *People ex rel. Schmidt v. Yerger*, 172 N.E.2d 753 (Ill. 1961); *Klann v. State*, 126 N.E.2d 487 (Ind. 1955); *State ex rel. Phillip v. Public School Retirement System of the City of St. Louis*, 262 S.W.2d 569 (Mo. 1953); *Koehnlein v. Retirement System for Employees of Allegheny County*, 97 A.2d 88 (Pa. 1953); *State v. Murphy*, 224 S.W.2d 68 (Mo. 1949); *Burton v. City of Albany*, 242 N.Y.S.2d 510 (N.Y. App. 1963); *S.W. Baird v. City of Fresno*, 217 P.2d 681 (Cal. App. 1950); *Villovic v. Valentine*, 294 N.Y.S. 352 (N.Y. App. 1936); *Haines v. Police Pension Board of the City of Phoenix*, 733 P.2d 1129 (Az. App. 1987); *McVay v. City of Washington Firemen's Pension Fund*, 556 A.2d 267 (Pa. 1989); *McCourtney v. Cory*, 176 Cal.Reporter 639 (Cal. App. 1981); *Chaunser v. Commissioners of Employment System of City of Newark*, 275 A.2d 1205 (N.J. App. 1977); *City of*

Philadelphia Board of Pensions and Retirements v. Boardly, 481 A.2d 690 (Pa. App. 1984).

4. Writ of Certiorari should be denied because the Circuit Court's holding does not expand the standard for summary judgment but scrupulously follows the standard set by this Court in *Celotex v. Catrett*, 477 U.S. 317 (1986) and its progeny.

Application of Summary Judgment Standard

Petitioner's final remaining argument is that certiorari should be granted because the Circuit Court violated the standards for granting summary judgment set down by this Court in *Celotex v. Catrett*, 477 U.S. 317 (1986) and its progeny. Again, for certiorari to be granted it must be shown that there is a conflict that is *clear, direct* and *unmistakable* with Supreme Court precedent and that such a conflict under the circumstances would create law of such national importance and effect that this Court should step in and exercise its discretionary powers to correct the error of the lower court. Vol. 13, Moore's Fed. Prac., Section 810.45 (2nd ed., 1991). The real issue in this case as to whether the summary judgment standard was properly applied does not affect such a great issue of national importance that certiorari is warranted. Second, and equally important, a review of the Fifth Circuit's decision clearly establishes that the Fifth Circuit's opinion is consistent with and not in conflict with the Summary Judgment standard set down by this Court.

The Ballot as Evidence

The Fifth Circuit properly relied upon the language in the ballot as one basis for affirming the trial court's decision. The ballot was not, as argued by Petitioner, extrinsic evidence because the ballot was attached to the Motion for Summary Judgment. (R III, 1). This ballot was not challenged in Petitioner's response to the Motion for Summary Judgment as required by the clear language of Fed. R. Civ. P. 56(e), as well as *Celotex*. Equally important, applicable state law requires that in deciding what a statute's intent is, the "entire act" must be considered which means "the caption, the body of the act and the emergency clause" *Brown v. Owens*, 674 S.W.2d 748, 750 (Tex. 1984). The caption of the amendment clearly provided for prospective application. *See Russell*, 968 F.2d at 493.

Furthermore, under the clear and unequivocal law of the State of Texas governing retroactivity, in the absence of an express statement in the Plan clearly and expressly stating that it is to be applied retroactively, the plan will not be applied retroactively. *See* Tex. Govt. Code Ann. § 311.022. The ballot reflects prospective application language. Even if the ballot were not considered the result would still be the same. What the ballot showed was a clear intent and a clear statement that the amendment was not to be applied retroactively. But even without that, the same result would occur under Section 311 of the Texas Government Code.

Retroactive Application

Petitioner argues that the Plan, as administered, is in fact applied retroactively because widows who had not previously remarried but whose husbands had died prior to 1988 would continue to receive survivor benefits while those widows who had remarried before 1988 and whose husbands had also died before 1988 would not receive survivor benefits. Petitioner argues that if her rights were "fixed and determined" by the Plan as it existed when her husband died, then all other widows' rights should be "fixed and determined" when their husbands died and they should not benefit from an amendment merely because they had not remarried at the time of the amendment.

Petitioner confuses the very nature of her survivor benefits. Upon the death of her husband, Petitioner's benefits under the Plan became "fixed and determined." The Plan benefit to which Petitioner thus became entitled was survivor benefits payable only until the earlier of her death or remarriage. When Petitioner remarried prior to the 1988 Plan amendment, all her right or entitlement to survivor benefits ceased. Petitioner was no longer in a class of persons entitled to benefits under the Plan, once she remarried.

The fact that some widows whose survivor benefits "fixed and determined" *before* 1988 had, as of 1988, not remarried or died, either of which would have caused their cessation of benefits, and the fact that the 1988 amendment relieved such widows from exposure to future benefit cessation from remarriage, does not alter the prospective application of the 1988 amendment's

removal of the remarriage rule. For an excellent illustration of how this traditional principle applies in benefit cases, please see the case of *Minor v. Stafford*, 157 N.E. 164 (Ill. 1927).

Fiduciary Claims

Lastly, Petitioner argues that summary judgment was improper because it ignored her breach of fiduciary duty claim in that the Board of Trustees had a fiduciary duty to Petitioner to treat her in the same manner as they treated other similarly situated widows. The fallacy of this claim is that Respondent did just that. All widows who remarried prior to April 21, 1988 ceased receiving survivor benefits. All widows who remarried after April 21, 1988 continued to receive survivor benefits. Once Petitioner's survivor benefits ceased and she was paid under the terms of the Plan as it existed both at the time of her husband's death and at the time of her remarriage, respondent no longer had a fiduciary duty to her. She was no longer a qualified surviving spouse entitled to receive benefits.

CONCLUSION

Writ of Certiorari should be denied because this case presents no proper basis for granting certiorari. There is no conflict with other circuits in this case. The Fifth Circuit's opinion does not conflict with this Court's opinion in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), nor does it conflict with the summary judgment standards set out in *Celotex v. Catrett*, 477 U.S. 317 (1986)

and its progeny. This case does not entail any great issues of national or even regional import and, when it is examined closely, is no more than a routine summary judgment case based upon state statute of limitations.

What is presented is a survivor under a pension plan who received the very benefits called for by the express terms of the Plan until an event of benefit cessation occurred (remarriage), at which time Respondent had fulfilled its obligations to Petitioner, having paid all the benefits to which Petitioner was entitled. Plan B was later amended more than two years after this event and Petitioner now wants to be brought back into the Plan. The Plan has no provision for reinstatement after benefits have been paid in full. More than four years after her survivor benefits were paid in full, Petitioner brought suit alleging various tort and contract-based causes of action.

All of these causes of action are subject to either a two or a four year statute of limitations. All of Petitioner's claims were brought more than four years after the running of the statute of limitations. Summary judgment based upon limitations is proper. Moreover, although summary judgment was granted on the basis of statute of limitations, it could have just as easily been granted on the merits because this Court and others have found that none of Petitioner's causes of action are viable. Consequently, because this case involves routine state law and federal law statute of limitations issues which have been decided against Petitioner's claims in

numerous other cases, Writ of Certiorari should be denied.

Respectfully submitted,

JOHN A. KOEPKE
HARVEY G. JOSEPH
GODWIN & CARLTON, P.C.
901 Main Street
Suite 3300
Dallas, Texas 75202-3714
(214) 939-4400

Of Counsel

GARY B. LAWSON
GODWIN & CARLTON, P.C.
901 Main Street
Suite 3300
Dallas, Texas 75202-3714
(214) 939-4400

Counsel of Record

Supreme Court, U.S.
FILED
FEB 16 1993
OFFICE OF THE CLERK

No. 92-998

In The

Supreme Court of the United States

October Term, 1992

ALMA FAYE RUSSELL,

Petitioner,

v.

CITY OF DALLAS AND THE BOARD OF TRUSTEES OF THE FIREMEN, POLICEMEN AND FIRE ALARM OPERATORS' PENSION FUND OF DALLAS, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

BARBARA R. HUNT
208 S. Akard
Room 2900
Dallas, Texas 75201
214/464-7551
Of Counsel

CAROL L. TACKER
208 S. Akard
Room 2900
Dallas Texas 75201
214/464-2219
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY AND OBJECTIONS TO RESPONDENTS' STATEMENT OF THE CASE

Respondents accuse Petitioner of an intentional mischaracterization of fact in her Petition for Writ of Certiorari based upon Petitioner's alleged assertion that "Respondent temporarily" withheld "her survivor benefits and that it was only after an evidentiary hearing pursuant to Section 6.07(d)(3) of Plan B that Respondents finally decided to deny her benefits." Brief in Opposition, p. 1. Petitioner has not mischaracterized facts.[1]

Petitioner has never stated that her benefits were being "temporarily" withheld; nor does the term "temporarily withheld" appear anywhere in Section 6.07 of Plan B. Respondents simply inserted the word "temporarily" into their restatement of Petitioner's position in order to be able to construct an argument that the hearing granted to Petitioner by the Board was not a Section 6.07(d)(3) hearing.

Respondents may now vehemently deny that the hearing granted to Petitioner was a Section 6.07(d)(3) hearing, but there was no such denial in the Board's February 15, 1989 letter responding to Petitioner's request for a Section 6.07(d)(3) hearing, setting a date for Petitioner's hearing.

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[1] Petitioner did not mischaracterize facts in her Petition. Petitioner's letter requesting a Section 6.07(d)(3) hearing is attached hereto as Exhibit A; the Board's response to that letter scheduling the hearing is attached as Exhibit B; a second letter from the Board announcing a delay in consideration of Petitioner's claim is attached as Exhibit C; and the letter from the Board notifying Petitioner of the Board's final ruling is attached as Exhibit D.

It is certainly true that the Board did not immediately rule on Petitioner's claim at their meeting on March 9, 1989, after hearing Petitioner's arguments and evidence, but deferred its decision to allow the Fund's attorney time to research the issue. See Exhibit C attached hereto. It is certainly true also that the Board considered and denied Petitioner's claim on May 11, 1989. See Exhibit D attached hereto.

Respondent asserts that "all discovery that was requested or sought was completed before summary judgment was granted." Brief in Opposition, p. 4. Plaintiff had filed a Motion to Compel Discovery on February 12, 1991, which was denied. However, the Order specified that "Such denial is without prejudice to Plaintiff's right to re-urge the motion if the pending motion for summary judgment is denied." Order of the Magistrate filed March 8, 1991.

SUMMARY JUDGMENT

First, as demonstrated by the arguments in Respondent's Statement of the case and elsewhere in the Brief in Opposition, both the District Court and the Circuit Court erroneously resolve disputed issues of fact in favor of movant to sustain the Summary Judgment.

Second, Respondent misconstrued Petitioner's "extrinsic evidence" argument. Petitioner was not arguing that the Ballot was outside the record in this case. Petitioner's argument is that determination of the intent of the Members of the Pension Plan when they voted on the amendment to Plan B based upon evidence outside

the terms of the Plan itself constituted resolution of a disputed fact issue in favor of movant.

Third, the court's holding in *Miner v. Stafford,* 157 N.E. 164 (Ill. 1927) does not support Respondent's arguments on retroactivity because that case does not involve a situation where widows who vested at or about the same time are being treated differently as to applicability of a pension amendment.

ARGUMENT

1. Characterization of the Pension Board hearing is a crucial and highly disputed issue of fact.

Whether or not the Pension Board hearing wherein Petitioner challenged the withholding of her benefits is characterized as a "Section 6.07(d)(3) hearing is a crucial issue of fact that was identified by the Board as a disputed fact on May 9, 1991, in their response to the Summary Judgment Motion of Petitioner on her contract cause of action. The Trial Court determined that Petitioner's cause of action accrued on April 26, 1986, when the Board first withheld her benefits because of remarriage. However, if the hearing is correctly characterized as a Section 6.07(d)(3) hearing, then by the terms of the Pension Plan here being construed, the Board's initial act of withholding Petitioner's benefits did not become final until May 11, 1989, by the specific terms of Plan B. Since Petitioner filed this lawsuit on May 10, 1990, it is very clear that no statute of limitations could have run from that operative date of May 11, 1989.

On the other hand, if Respondent's characterization of the hearing is correct, it adds weight to Petitioner's breach of fiduciary duty claim because the Board never gave any indication to Petitioner that they did not consider that hearing to be a Section 6.07(d)(3) hearing, until after Petitioner filed her lawsuit in reliance upon the May 11, 1989 date as the operative date for statutory purposes.

If the Board had notified Petitioner in its February 15, 1989 letter that Plaintiff was not entitled to a Section 6.07(d)(3) hearing, Plaintiff would have been on notice that the Board considered its earlier action final without any hearing. February 15, 1989 was well within the contract statute of limitations date for the initial denial of benefits.

2. Respondent misconstrues Petitioner's "extrinsic evidence" argument.

Petitioner was not arguing that the Circuit Court's reliance upon the Ballot language to determine "legislative intent" was error because that ballot language was outside the record herein. Petitioner was arguing that the question of "intent" is a question of fact, especially in circumstances such as these, and that the Court erred in looking to evidence extrinsic to the terms of the *Plan* itself for the purpose of determining intent. Here, again, a disputed fact issue is being improperly resolved by the Court in favor of the Movant to support a Summary Judgment. In citing *Brown v. Owens*, 674 S.W.2d 748 (Tex. 1984), Respondents appear to be trying to characterize the ballot short form description of the Plan language as a "caption". A "ballot", however, is not a "caption." As is

clear even from the *Brown v. Owens* case, a caption is the descriptive title of an act, indicating the purpose and application of the act. *See also; LeCroy v. Hanlon,* 713 S.W.2d 335, 337-338 (Tex. 1986). Further, in footnote 3 of *Edwadyne Forbau v. Aetna Life Insurance Co.,* 36 Tex. S. Ct. Journal 140 (Tex. 1992), the Texas Supreme Court makes it very clear that the term "caption" is synonymous with the word "heading".

The difference between "captions" and "ballots" is placed in proper perspective in *Hill v. Evans,* 414 S.W.2d 684 (Tex. Civ. App. – Austin 1967, writ ref'd n.r.e.)

The primary question in *Hill v. Evans* was whether "the language of the ballot submitting the proposed amendment under House Joint Resolution No. 13 was sufficient to identify the amendment and to give fair notice to the voter of its intent and subject matter." Id. at 686. The argument in that case was that the ballot language was insuffient because it did not fully disclose all the effects of the actual constitutional amendment.

As is clear from the cases cited above, ballot language does not in and of itself form any part of a statutory provision; it merely directs the voters to the actual provisions of the statute on which they are to cast their vote. Such conclusion is also supported by the record documents in this case. As referenced on page 22 of the Petition, the "Ballot Explanation" directive to the Members referred the members to the actual Plan Amendments. The Plan Amendment for Section 6.07 was set forth as section J of Petitioner's APPENDIX herein. Nowhere in that actual amendment language is there any indication that the amendment is only to apply to widows

still receiving benefits; there is only the introductory description that the amendment "shall apply to all current Plan B active members, retirees, and survivors." Petitioner has at all times met the current Plan B definition of "survivor," even though her benefits were being withheld after her remarriage.

3. The holding in *Miner v. Stafford* does not support Respondent's retroactivity arguments.

The holding in the *Miner v. Stafford* case is that the widow's right to benefits, under the terms of the statutory pension plan there at issue, vested at her husband's death. The court there determined that the statute there being considered was not retroactive, so the widow was denied the increase in benefits provided by the amendment there at issue.

Here, however, Respondent's argue that the amendment to Plan B applies for the benefit of some widows whose benefits vested at their husband's deaths that occurred prior to the effective date of the amendment (those who had not yet remarried), but that the amendment does not apply for others whose rights vested at or about the same time. *Miner v. Stafford* could properly be cited as support for the date of vesting being the date of the husband's death and for the proposition that a non-retroactive statute has no effect on benefits for widows whose rights vested prior to the effective date of the amendment.

In other words, if Respondents were arguing that the amendment to Plan B does not apply for any widow whose husband died prior to the effective date of the

amendment, then *Miner v. Stafford* would support their argument. Here, however, the Board for their own convenience is applying the amendment for the benefit of all widows who were receiving benefits on the effective date of the amendment to allow those widows to now remarry without losing their benefits, but denying such allegedly retroactive application to other widows (such as Petitioner) whose rights had vested at or about the same time. *Miner v. Stafford* provides no support for such analysis.

CONCLUSION

The Respondents did not squarely address the issues raised in the Petition, but instead have demonstrated that this case was decided on the basis of resolution of disputed facts in favor of the movant. Such judicial action goes way beyond the standard set by the Supreme Court for application of summary judgment, endangering the individual right to jury trials of fact issues. As previously argued in the Petition, such decision conflicts with this Court's direction in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). Petitioner relies on the arguments in her Petition and herein to respectfully pray that the Supreme Court of the United States grant certiorari and reverse the

opinions below to return this case to the trial court for a jury trial.

Respectfully submitted,

CAROL L. TACKER
State Bar of Texas
No. 19605600
208 S. Akard, Room 2900
Dallas, Texas 75201
(214) 464-2219

Counsel of Record

EXHIBIT A

BARBARA R. HUNT
ATTORNEY AT LAW
One Bell Plaza • Room 2900 464-7551
P.O. Box 655521 AREA CODE 214
Dallas, Texas 75265-5521

February 3, 1989

Jerry M. Hast, Administrator
Police and fire Pension Fund
City Hall
Dallas, Texas 75201

Re: Request of Alma Faye Russell for her Pension Benefits to be Reinstated

Dear Mr. Hast:

Please be advised that I represent Alma Faye Russell in regard to the above-referenced matter. On behalf of Ms. Russell, and pursuant to Section 6.07(d)(3) of Plan B, I hereby request a hearing before the Board to present testimony why her benefits should be continued.

Please advise me of the time and date for the hearing as soon as possible.

Thank you for your consideration of this matter.

Yours very truly,

/s/ Barbara R. Hunt
Barbara R. Hunt

CC: Mrs. Alma Faye Russell

BRH/ts

EXHIBIT B

Logo
CITY OF DALLAS

February 15, 1989

Barbara R. Hunt
Attorney at Law
One Bell Plaza, Room 2900
P. O. Box 655521
Dallas, Texas 75265-5521

Dear Ms. Hunt:

The Dallas Police and Fire Pension Fund office has received your letter dated February 3, 1989, regarding your request to address the Board of Trustees regarding Alma Faye Russell's request to have her survivor benefits continued. Your request has been placed on the agenda for the Board meeting on Thursday, March 9, 1989. The meeting will be held in room 6 E South, City Hall; 1500 Marilla; Dallas, Texas, beginning at 1:30 p.m. Your request will be considered at approximately 1:45 p.m.

If you have any questions, please contact either Linda Rickley or myself at 670-4267.

Sincerely,

/s/ Jerry M. Hast
Jerry M. Hast, Administrator
Police and Fire Pension Fund

LNR/st

cc: Alma Faye Russell

EXHIBIT C

Logo
CITY OF DALLAS

March 14, 1989

Barbara R. Hunt
Attorney at Law
One Bell Plaza, Room 2900
P. O. Box 655521
Dallas, Texas 75265-551

Dear Ms. Hunt:

At the March 9, 1989 meeting, the Police and Fire Pension Fund Board considered your request, on behalf of Alma Faye Russell, to have her survivor benefits reinstated. The Board deferred its decision in order to allow the Fund's attorney time to research the issue. The Fund's attorney has resigned and the Board is in the process of retaining new legal counsel. You will be notified of the date, time and place of the meeting.

If you have any questions, please contact either Linda Rickley or myself at 670-4267.

Sincerely,

/s/ Jerry M. Hast
Jerry M. Hast, Administrator
Police and Fire Pension Fund

cc: Alma Faye Russell

EXHIBIT D

Logo
CITY OF DALLAS

May 15, 1989

Alma Faye Russell
Rt. 4, Box 49
Lindale, Texas 75711

Dear Ms. Russell:

At the May 11, 1989 meeting, the Police and Fire Pension Board considered your request to have your survivor benefits reinstated. The Board voted to deny your request, based on the plan language which requires that in order to be eligible for the lifetime survivor benefit, you must have been receiving a survivor benefit on April 21, 1988, which was the effective date of the amendment.

The Board directed the staff to determine the number of surviving spouses who might be in the same category as yourself. Once this information is gathered, the Fund's actuary will estimate the cost of reinstating survivor benefits to those persons. Your request for a plan amendment allowing reinstatement of your former benefits will be considered the next time that benefit improvements are evaluated.

You will be notified of the date, time and place of the Board meeting at which the actuary will discuss the estimated costs with the Board.

If you have any questions, please call Linda Rickley at (214) 670-4267.

Sincerely,

/s/ Richard L. Tettamant
for Jerry M. Hast, Administrator
Police and Fire Pension Fund

LNR/st